

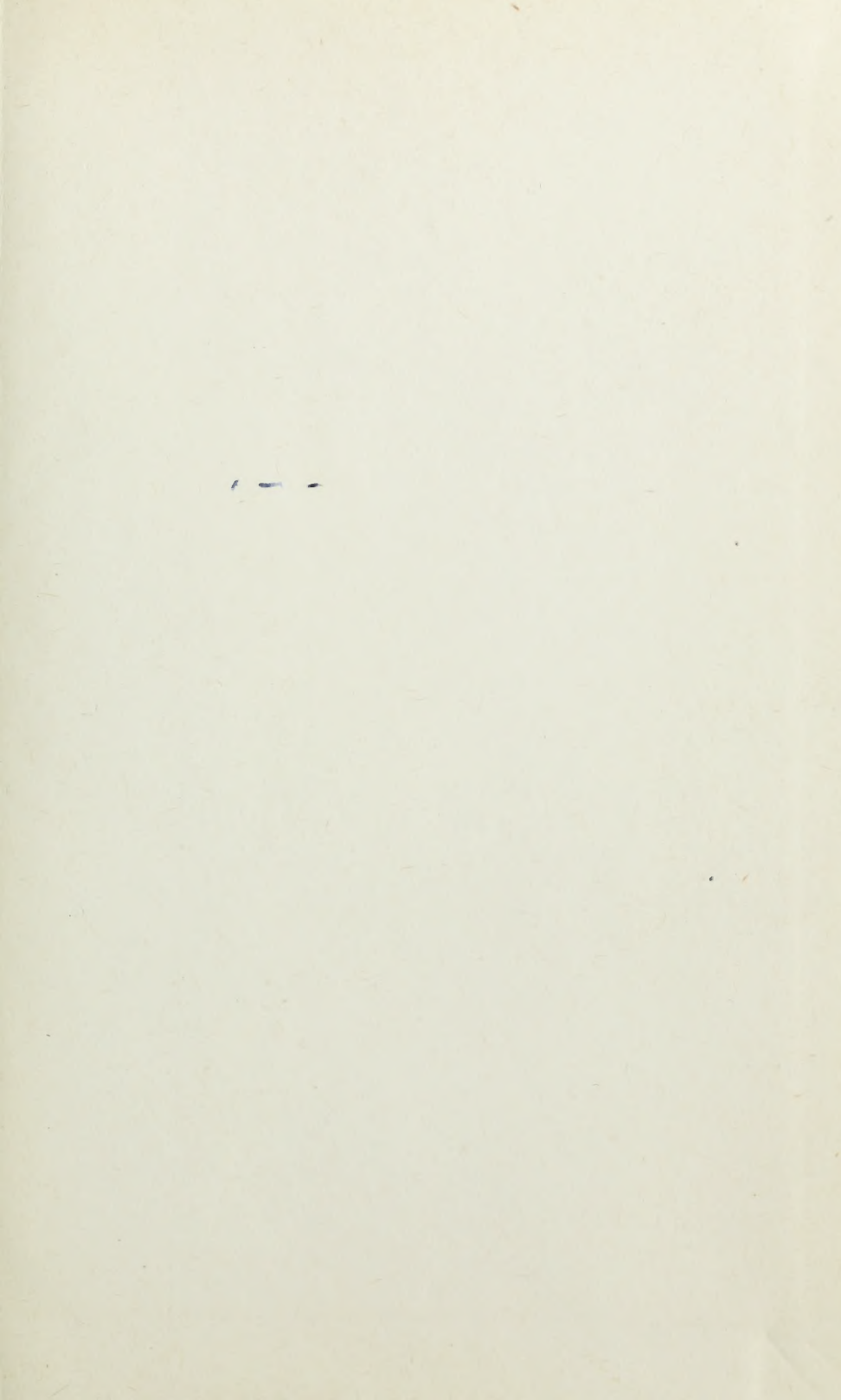
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No. 11146

v. 2435

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC PUBLIC SERVICE COMPANY,
a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.


Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

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PAUL P. O'BRIEN,
CLERK



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PACIFIC PUBLIC SERVICE COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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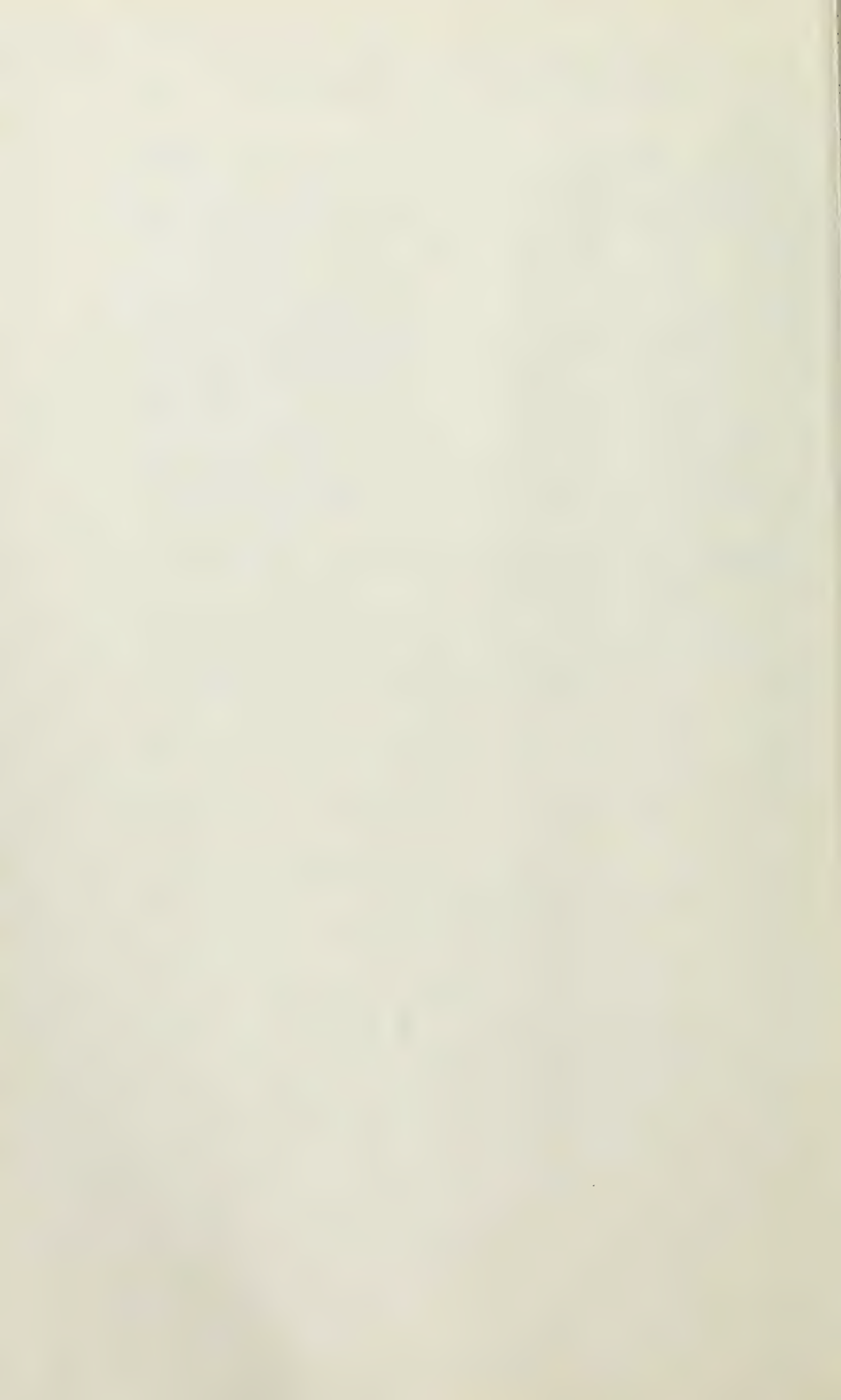
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APPEARANCES

For Taxpayer:

FELIX T. SMITH, ESQ.,
SIGVALD NIELSON, ESQ.,
GRANVILLE S. BORDEN, ESQ.,
SCOTT C. LAMBERT, ESQ.,

For Comm'r.:

HAROLD D. THOMAS, ESQ.,

Docket No. 2159

PACIFIC PUBLIC SERVICE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

Transferred to Judge Oppen 11/22/44.

1943

Jun. 17—Petition received and filed. Taxpayer notified. Fee paid.

“ 17—Copy of petition served on General Counsel.

“ 17—Request for Circuit hearing in San Francisco filed by taxpayer. 6/17/43 granted.

Jul. 16—Answer filed by General Counsel.

“ 19—Copy of answer served on taxpayer. San Francisco, Calif.

Oct. 14—Hearing set Nov. 22, 1943 at San Francisco, Calif.

1943

Nov. 26—Hearing had before Judge Arundell on merits. Motion of respondent to amend answer and of petition to file amendment to petition. Both motions granted and amendments received. Stipulation of facts filed. Respondent's motion to amend and amendment to answer and petitioner's motion to amend and amendment to petition filed. Respondent's answer to amendment to petition filed. Service made on opposing party of each amendment. Petitioner's brief due Jan. 10, 1944—respondent's 2/9/44—reply 2/29/44.

Dec. 21—Transcript of hearing of 11/26/43 filed.
1944

Jan. 7—Notice of the appearance of Scott C. Lambert as counsel filed.

“ 12—Motion for extension of 15 days to file brief filed by taxpayer.

“ 12—Order extending time to Jan. 29, 1944 to file petitioner's brief, February 28, 1944 to file respondent's brief and March 19, 1944 to file petitioner's reply brief entered.

“ 27—Order granting petitioner 10 days to file his brief entered. (Tel.)

Feb. 7—Brief filed by taxpayer. 2/7/44 copy served.

Mar. 8—Motion for extension to March 19, 1944 to file respondent's brief filed by General Counsel. 3/10/44 granted.

1944

Mar. 18—Motion for extension to May 19, 1944 to file respondent's brief filed by General Counsel. 3/22/44 granted.

May 11—Motion for extension to July 15, 1944 to file respondent's brief filed by General Counsel. 5/12/44 granted.

Jul. 15—Reply brief filed by General Counsel.

“ 26—Motion for extension to Aug. 15, 1944 to file reply brief filed by taxpayer. 7/26/44 granted.

Aug. 14—Motion for extension of 60 days to file reply brief filed by taxpayer. 8/15/44 granted.

Oct. 12—Reply brief filed by taxpayer. 10/12/44 copy served. [1*]

“ 12—Motion for leave to file the attached amended petition, amended petition lodged filed by taxpayer. 10/17/44 granted.

“ 12—Motion to reopen record for admission of evidence material since the enactment of the revenue act of 1943 filed by taxpayer. 10/17/44 granted.

“ 12—Supplemental stipulation of facts filed.

“ 17—Copy of motions and amendment to petition served on General Counsel.

Nov. 1—Answer to amendment to petition filed by General Counsel. 11/2/44 copy served.

*Page numbering appearing at top of page of original certified Transcript.

1945

- Feb. 8—Findings of fact and opinion rendered, Oppen J. Decision will be entered under Rule 50. Copies served.
- Mar. 6—Motion for reconsideration and review by the entire court of the opinion rendered, filed by taxpayer. 3/8/45 denied as to reconsideration and 3/8/45 denied as to Court review.
- “ 13—Computation of deficiency filed by General Counsel.
- “ 17—Hearing set April 18, 1945 on settlement.
- Apr. 18—Hearing had before Judge Oppen on settlement under Rule 50. Decision to be entered in accordance with respondent's computation.
- “ 20—Decision entered Clarence V. Oppen, Div. 14.
- Jul. 20—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- “ 20—Proof of service filed by taxpayer.
- Sep. 4—Certified copy of order from U. S. Circuit Court of Appeals, 9th Circuit, extending the time to 9/28/45 to prepare and transmit record filed.
- “ 19—Designation of portions of the record to be printed, filed by taxpayer with proof of service thereon.
- “ 20—Statement of points filed by taxpayer with proof of service thereon.

1945

Sept. 20—Designation of record filed by taxpayer with proof of service thereon. (Agreed to).

The Tax Court of the United States

Docket No. 2159

PACIFIC PUBLIC SERVICE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IRA: 90-D-C:TS:PD:SE:WGW) HEA dated March 26, 1943, and as a basis of its proceeding alleges as follows:

1. Petitioner is a corporation organized under the laws of the State of California, with its principal office at 225 Bush Street, San Francisco, California. The return for the period involved was filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 26, 1943.

3. The taxes in controversy are income taxes and income defense taxes for 1940 in the sum of \$37,831.36. [3] Of this sum, \$30,488.15 has been paid to the Collector for the First District of California and petitioner has filed a claim for refund of this amount. The balance of the amount in controversy is the deficiency of \$7,343.21 proposed by respondent.

4. The determination of tax set forth in the said deficiency notice is based upon the following errors:

(a) The failure to allow adequate deduction for the loss sustained in the year 1940 by petitioner from the sale by petitioner in 1940 of its bonds and stock of California Consumers Corporation;

(b) The finding that the basis for the bonds and stock of California Consumers Corporation sold by petitioner in 1940 is \$28,757.75;

(c) The holding that petitioner did not receive the bonds and stock of California Consumers Corporation pursuant to a reorganization within the meaning of section 112 (g) of the Revenue Act of 1934 as amended;

(d) The holding that section 112 (b) (5) of the Revenue Act of 1934 as amended is not applicable because the stock and securities received by petitioner are not substantially in proportion to the interest of petitioner in the property prior to the exchange;

(e) The holding that a loss arose from a transaction separate and distinct from and anterior to the exchange of property of California Consumers Company for bonds [4] and stock of California Consumers Corporation and that such loss must be recognized under the general rule of section 112 (a) of the Revenue Act of 1934 as amended.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(A) Facts Relating to the Sale by Petitioner of Its Bonds and Stock of California Consumers Corporation

(1) On September 25, 1940, and on October 7, 1940, petitioner sold to Turner Poindexter and Company of Los Angeles, California, all its bonds and shares of stock of California Consumers Corporation for \$19,654.85 cash.

(2) The bonds of California Consumers Corporation sold by petitioner on September 25, 1940, were bonds in the principal sum of \$75,000, with participating certificate for 600 shares of stock held by voting trustees, and constituted 2.14 plus per cent of the amount of bonds outstanding on the date of sale (the total amount outstanding was in the principal sum of \$3,496,500), and 2.14 plus per cent of the participating certificates outstanding on the date of sale. (The total amount of voting certificates outstanding was 27,972.)

(3) The stock of California Consumers Corporation sold by petitioner on October 7, 1940, consisted

of 4,640.5 shares and constituted 8.55 plus per cent of the total shares outstanding on the date of sale. (The total number of shares outstanding on the date of sale was 54,274 shares, of which [5] 27,972 shares were held by voting trustees.)

(4) In connection with this sale petitioner incurred expenses of \$53.72.

(B) Facts Relating to the Determination of the Basis (Unadjusted) of the Bonds and Stock of California Consumers Corporation Sold by Petitioner in 1940

(1) The bonds and stock of California Consumers Corporation sold by petitioner in the year 1940 were acquired by petitioner in the year 1935 pursuant to a plan of reorganization of California Consumers Company through proceedings confirmed by the United States District Court for the Southern District of California, Central Division, on September 30, 1935, and consummated under the provisions of section 77-B of the Federal Bankruptcy Act.

(2) Pursuant to the terms of the plan of reorganization California Consumers Corporation was organized and thereafter, in 1935, issued bonds in the principal sum of \$3,496,500, and 54,274 shares of stock to bondholders, shareholders, and the unsecured creditor of California Consumers Company.

(3) For each \$1,000 principal amount of bonds, with all appurtenant coupons maturing after Sep-

tember 30, 1933, of California Consumers Company there was issued \$1,000 principal amount of new bonds of California Consumers Corporation, and 8 participating certificates for 8 shares of new stock of California Consumers Corporation. The 8 shares were held by voting trustees. [6]

(4) For each \$500 principal amount of bonds with all appurtenant coupons maturing after September 30, 1933, there was issued \$500 principal amount of new bonds of California Consumers Corporation and 4 participating certificates for 4 shares of new stock of California Consumers Corporation. The 4 shares were held by voting trustees.

(5) For each share of preferred stock of California Consumers Company outstanding with all dividends accumulated and unpaid thereon, there was issued 1.5 shares of new stock of California Consumers Corporation.

(6) To petitioner, as unsecured creditor of California Consumers Company in the amount of \$478,270, there was issued 3,287.5 shares of new stock of California Consumers Corporation.

(7) Petitioner received nothing from California Consumers Corporation for its release of its rights as common stockholder of California Consumers Company.

(8) In the aggregate the exchanges were as follows:

**FORMER BONDHOLDERS, UNSECURED CREDITORS AND
SHAREHOLDERS OF CALIFORNIA CONSUMERS
COMPANY**

Transferred	Received	
	Bonds	Stock
First mortgage bonds in principal amount of \$3,496,500	First mortgage bonds in principal amount of \$3,496,500, and	27,972 participating certificates for 27,972 shares of stock
Preferred stock holders of 15,343 shares—par \$100	None	23,014.5 shares
Unsecured creditor in amount of \$478,270 (owned by petitioner)	None	3,287.5 shares
Common stock, 25,000 (owned by petitioner)	None	None
	<hr/>	<hr/>
Total	\$3,496,500 bonds	54,274 shares of stock

(9) (a) Petitioner at the time of the reorganization under section 77-B owned bonds of California Consumers Company in the principal sum of \$75,000 with appurtenant coupons maturing after September 30, 1933.

(b) Through the reorganization under section 77-B petitioner's rights in bonds of California Consumers Company in the principal amount of \$75,000 with all appurtenant coupons maturing after September 30, 1933, were modified and altered by the conveyance to the new corporation of the properties free and clear of claims (with certain exceptions) against California Consumers Company and by the issuance of new securities in exchange for such bonds and appurtenant coupons.

(c) Petitioner received, in exchange for this modification and alteration in its rights in bonds of California Consumers Company in the principal amount of [8] \$75,000, together with all appurtenant coupons maturing after September 30, 1933, bonds of California Consumers Corporation in the principal sum of \$75,000 and participating certificates for 600 shares of stock of California Consumers Corporation.

(d) These new bonds of California Consumers Corporation, having a face value of \$75,000, together with the participating certificates for 600 shares, were the bonds and participating certificates which petitioner sold in 1940, as alleged in paragraph 5 (A) (2) above.

(e) The bonds formerly owned by petitioner and by all other bondholders of California Consumers Company were assigned and transferred to California Consumers Corporation, the new company.

(f) Thereafter these bonds were transferred by the new company to the trustee under the trust indenture for the new bonds to be held as additional and collateral security for the new bonds.

(g) The bonds of California Consumers Company in the principal sum of \$75,000 owned by petitioner at the time of the reorganization had been acquired by petitioner at various intervals between April 1, 1931, and July 31, 1933, at a cost of \$54,877.66.

(10) (a) Petitioner, at the time of the reorganization under section 77-B, owned 902 shares of preferred stock of California Consumers Company. [9]

(b) Through the reorganization under section 77-B petitioner's rights in 902 shares of preferred stock of California Consumers Company were modified and altered by the conveyance and transfer to the new corporation of the properties free and clear of all claims (with certain exceptions) against California Consumers Company, its stockholders and creditors, and by the issuance by California Consumers Corporation of new shares in exchange for such preferred shares in California Consumers Company held by them.

(c) Petitioner, through the reorganization, received in exchange for 902 preferred shares of California Consumers Company, 1,353 shares of California Consumers Corporation.

(d) These 1,353 shares of California Consumers Corporation were part of the 4,640.5 shares sold by petitioner in 1940 as alleged above in paragraph 5 (A) (3).

(e) The 902 preferred shares of California Consumers Company owned by petitioner at the date of the reorganization had been acquired by petitioner at various intervals during the years 1931, 1932, and 1933 at a cost of \$51,001.75.

(11) (a) Petitioner, at various intervals prior

to the reorganization, loaned cash to California Consumers Company in the amount of \$478,270.

(b) Petitioner, prior to the reorganization, [10] had never received any cash or other property in payment, in whole or in part, of these loans.

(c) At the date of reorganization this indebtedness of California Consumers Company to petitioner was evidenced by a note dated May 31, 1933, but otherwise petitioner was an unsecured creditor of California Consumers Company in the principal sum of \$478,270.

(d) Through the reorganization under section 77-B in 1935 petitioner's rights as an unsecured creditor of California Consumers Company were altered and modified by the conveyance and transfer to the new corporation of the properties of California Consumers Company to California Consumers Corporation free and clear of all claims (with certain exceptions) against California Consumers Company, its stockholders and creditors, and by the issuance by California Consumers Corporation of 3,287.5 new shares in exchange for petitioner's unsecured claim against California Consumers Company (see paragraph 5 (B) (6) above).

(e) Petitioner has never claimed any portion of the indebtedness of California Consumers Company as partially or wholly worthless in any of its income tax returns.

(f) The 3,287.5 new shares received by petitioner for its unsecured claim of \$478,270 were part

of the 4,640.5 shares sold by petitioner in 1940 as alleged in paragraph 5 (A) (3) above. [11]

(12) The amount and value of the stock and securities of California Consumers Corporation to be received by petitioner (as alleged in paragraphs 5 (B) (9) (c), 5 (B) (10) (c) & 5 (B) (11) (d) above), pursuant to the aforesaid reorganization of California Consumers Company, in exchange for the interests of petitioner in the properties of California Consumers Company prior to such exchange, were fixed and determined as a result of an appraisal by the bondholders' protective committee, preferred stockholders' committee, and petitioner, of the respective interests of the security holders represented by such committees and of the interest of petitioner as an unsecured creditor in the properties of California Consumers Company prior to such exchange, and the amount and value of the stock and securities of California Consumers Corporation received by petitioner as so fixed and determined were substantially in proportion to the interest of petitioner in such properties prior to the exchange; and the amount and value of the stock and securities of California Consumers Corporation received by each and every other person holding an interest in such properties were likewise fixed and determined as a result of the same appraisal and were likewise substantially in proportion to the interests of each and every other of such persons in the properties of California Consumers Company prior to the exchange.

(C) Facts Relating to the Determination of the Adjusted Basis of the Bonds and Stock of California Consumers Corporation Sold by Petitioner in 1940 [12]

(1) During the period petitioner owned preferred or common shares of California Consumers Company it received no distributions from California Consumers Company as distributions of capital.

(2) During the period petitioner owned participating certificates and stock of California Consumers Corporation it received no distributions from California Consumers Corporation either as dividends or as distributions of capital.

(D) Facts Relating to Overpayment of 1940 Income Taxes and Claim for Refund

(1) In 1941 petitioner paid \$30,488.15 to the Collector of Internal Revenue for the First District of California as income taxes for the year 1940 in four equal quarterly installments (March 15, June 15, September 15, and December 15).

(2) On April 22, 1942, petitioner filed a claim for refund with the Collector of Internal Revenue for the First District of California for \$30,488.15, representing all the income taxes paid in the year 1941 for the year 1940.

(3) The facts supporting this claim for refund are the same as the facts alleged in paragraphs 5 (A), 5 (B) and 5 C).

Wherefore, petitioner prays that this Honorable Court may hear the proceedings and order that [13] petitioner sustained and realized a loss of \$564,548.28 in the year 1940 from the sale of bonds and shares of California Consumers Company; that respondent erred in failing to allow this amount as a loss in lieu of \$9,102.90; that petitioner derived no taxable income for the year 1940; that there is no deficiency for 1940; that petitioner overpaid \$30,488.15 income taxes for the year 1940; that petitioner filed claim for refund of such overpayment within two years from the date of such overpayment; that an overpayment of \$30,488.15 shall be refunded or credited to petitioner.

Dated San Francisco, California, June 14, 1943.

FELIX T. SMITH

SIGVALD NIELSON

GRANVILLE S. BORDEN

Attorneys for Petitioner [14]

State of California,

City and County of San Francisco—ss.

H. L. Farrar, being first duly sworn, deposes and says: That he is an officer, to wit, the Vice President of Pacific Public Service Company, a corporation, the petitioner named in the foregoing action, and makes this verification for and on behalf of said corporation; that he has read the foregoing Petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief,

and as to those matters that he believes it to be true.

H. L. FARRAR

Subscribed and sworn to before me this 14th day of June, 1943.

[Seal] FRANK L. OWEN

Notary Public in and for the City and County of
San Francisco, State of California [15]

EXHIBIT A

SN—IT—1

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco, California

Office of
Internal Revenue Agent in Charge
San Francisco Division

IRA:90-D
(C:TS:PD
SF:WGW)
HEA

Mar. 26, 1943

Pacific Public Service Company
225 Bush Street
San Francisco, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended De-

cember 31, 1940, discloses a deficiency of \$7,343.21 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By F. M. HARLESS

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of waiver.

HEA [16]

Statement

Pacific Public Service Company

225 Bush Street

San Francisco, California

Tax Liability for the Taxable Year Ended December 31, 1940.

	Liability	Assessed	Deficiency
Income Tax	\$37,831.36	\$30,488.15	\$7,343.21

In making this determination of your income tax liability, careful consideration has been given to your protest dated April 8, 1942, and supplement dated July 7, 1942; to the statements made at the conferences held on May 14, 1942, and February 19, 1943, and to your claim for refund filed on April 22, 1942.

If a petition to The Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Tax Court in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 3772(a)(2) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. Felix T. Smith, Esq., Standard Oil Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office. [17]

Adjustments to Net Income

Year: 1940

Net income for declared value excess-profits tax computation as disclosed by return	\$846,893.02
Unallowable deductions and additional income:	
(a) Net long-term capital loss adjusted.....	83,421.31
	<hr/>
Total.....	\$930,314.33
Nontaxable income and additional deductions:	
(b) Adjustment of capital stock tax accrual.....	7,001.60
	<hr/>
Net income for declared value excess-profits tax computation adjusted	\$923,312.73

Explanation of Adjustments

(a) In the year 1935 you received bonds and stock of California Consumers Corporation, a newly organized corporation, in exchange for your equitable interest in the properties of California Consumers Company, a corporation which had defaulted in the payment of its bonds. The bonds and stock were received pursuant to a 77B proceeding. California Consumers Company was organized in 1928. At that time you acquired its entire common stock and remained the owner of said common stock during the life of the Company. In the interim between 1928 and 1933 you acquired bonds of the Company of a face value of \$75,000.00 at a cost of \$54,877.66. In that period you also acquired 902 shares of preferred stock of said corporation at a cost of \$51,001.75. You had also made advances to said corporation during that period and in 1933 took the corporation's note therefor in the amount

of \$478,270.00. In 1933 you wrote down the above-mentioned items to \$15,001.00. On December 2, 1933 the trustee under the bond indenture securing the bonds filed its bill of complaint for the foreclosure of the indenture in the United States District Court at Los Angeles, and requested the appointment of a receiver of the properties ancillary to and pending the outcome of the foreclosure action. A receiver was appointed who operated the properties up to 1935. Article III of the plan provided in part as follows: [18]

“The properties will be transferred to or acquired by the new corporation free and clear of all claims of the debtor, its stockholders and creditors, except liabilities incurred by the receiver and obligations of the debtor to its subsidiaries and affiliated companies which are to be assumed as provided in Article IX hereof.”

Under the plan of reorganization the bondholders, Pacific Public Service Company, as unsecured creditor, and the preferred stockholders received securities in the new corporation as follows:

Holders of:	Received		
	Bonds (partially income)	Stock	Per Cent of Stock
First Mortgage Bonds (face \$3,496,500)	\$3,496,500.00	27,972 shares	52
Pacific Public Service Company as unse- cured creditor (face \$478,270)	3,287.5 shares	6
Preferred stockholders (15,343 shares par \$100)	23,014.5 shares	42
Common stock (25,000 shares)
	<u>\$3,496,500.00</u>	<u>54,274</u>	<u>100</u>

The bonds of the old company provided for interest at 6 per cent per annum and were due in 20 years from 1928. The bonds of the new company provided for interest at 3 per cent per annum payable unconditionally, and an additional 2 per cent per annum to be paid out of income, subject to certain restrictions and the discretion of the board of directors, and if the "income interest" is not earned and available in any annual period it shall not accumulate. The bonds of the new company were dated in 1935 and due in 20 years. The stock issued to the bondholders of the new company was issued to voting trustees under a voting trust agreement to endure for 21 years. In the year 1940 you sold all of the bonds and stock of the new corporation that had been received by you pursuant to the 77B preceeding for \$19,654.85 and claimed a loss of \$92,524.53 upon your return. A summary of the

computation made by you on your return is as follows: [19]

Description	Acquired	Selling Price	Cost	Expense	Loss
75,000.00 bonds	1931-33				
300 shares stock		\$18,750.00	\$ 54,877.66	\$53.72	(\$36,181.38)
,353 shares stock	1931-33	263.82	51,001.75		(50,737.93)
,287.5 shares stock		641.03	6,246.25		(5,605.22)
	Totals	\$19,654.85	\$112,125.66	\$53.72	(\$92,524.53)

You now contend that the basis for above-mentioned item (3) should be \$478,270.00. It is held that your basis for all of the above-mentioned stock and bonds which you sold in 1940 is \$28,757.75, producing a loss of \$9,102.90. It is also held that you did not receive the bonds and stock of the new company pursuant to a reorganization within the meaning of section 112(g) of the Revenue Act of 1934, as amended, and, therefore, none of the exceptions under 112(b) of said Act, cited by you, apply. Nor is section 112(b)(5) of said Act, cited by you, applicable because the stock and securities received are not substantially in proportion to the interest in the property prior to the exchange. Even if section 112(b)(5) were applicable, a loss arose from a transaction which was separate and distinct from and anterior to an exchange of property of the old company for the new securities and must be recognized under the general rule of section 112(a) of the Revenue Act of 1934.

(b) You are allowed an additional deduction of \$7,001.60 for capital stock tax, which accrued as of July 1, 1940, computed as follows:

Declared value of your capital stock as shown in the return filed for the year ended June 30, 1941	\$ 8,500,000.00
Tax thereon at \$1.10 per M	9,350.00
Add: Defense tax for year 1940 not previously allowed	401.60
Total deductible	9,751.60
Claimed on return	2,750.00
Additional deduction	\$ 7,001.60

Computation of Declared Value Excess-Profits Tax

Net income for declared value excess-profits tax computation	\$ 923,312.73
Less:	
10% of \$4,016,603.15, value of capital stock as declared in your capital stock tax return for the year ended June 30, 1940	\$401,660.32
Dividends received credit (85% of \$900,802.38)	765,682.02
	1,167,342.34
Balance subject to declared value excess-profits tax	None
Total declared value excess-profits and declared value excess-profits defense taxes assessable.....	0.00
Declared value excess-profits tax assessed:	
Original, account No. 411186—First California District	0.00
Deficiency (Over-assessment) of declared value excess-profits tax.....	0.00

Computation of Income Tax

(Corporations with normal tax net incomes of
\$38,565.89 or more)

Net income for declared value excess-profits tax computation	\$923,312.73
Less:	
Declared value excess-profits tax	0.00
Adjusted net income	\$923,312.73
Less:	
Dividends received credit	765,682.02
Normal tax net income	\$157,630.71
Income tax (22.1% of \$157,630.71)	34,836.38
Income defense tax (1.9% of \$157,630.71, normal tax net income)	2,994.98
Total income and income defense taxes assessable.....	\$ 37,831.36
Income tax assessed: Original, account No. 411186, First California District	30,488.15
Deficiency of income tax	\$ 7,343.21

[Front of Enveloped]

Treasury Department	Penalty for Private Use to
Office of Internal Revenue	Avoid Payment of Post-
Agent in Charge	age, \$300
74 New Montgomery St.	
San Francisco, Calif.	

Official Business [Cancelled Stamp]

[Initials]: CMK

Pacific Public Service Company
225 Bush Street
San Francisco, California

[Stamp]: Registered No. 988000

[Stamp]: Received Mar 27 1943 San Francisco

[Stamps reverse side of envelope]:

San Francisco, Calif.	Mar 26, 1943	Reg. Sec.
San Francisco, Calif.	Mar 26 1943	Registered
San Francisco, Calif.	Mar 26 1943	Registered

[Seal]

[Endorsed]: T.C.U.S. Filed June 17, 1943.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. (a) to (e), inclusive. Denies that the determination of tax set forth in the notice of deficiency is based upon errors as alleged in subparagraphs (a) to (e), inclusive, of paragraph 4 of the petition. [24]

5. (A)(1) Admits the allegations contained in subparagraph (A) (1) of paragraph 5 of the petition.

(A)(2) For lack of information denies the allegations contained in subparagraph (A)(2) of paragraph 5 of the petition.

(A)(3) For lack of information denies the allegations contained in subparagraph (A)(3) of paragraph 5 of the petition.

(A)(4) For lack of information denies the allegations contained in subparagraph (A)(4) of paragraph 5 of the petition.

(B)(1) Admits the allegations contained in subparagraph (B)(1) of paragraph 5 of the petition.

(B)(2) Admits the allegations contained in subparagraph (B)(2) of paragraph 5 of the petition.

(B)(3) For lack of information denies the allegations contained in subparagraph (B) (3) of paragraph 5 of the petition.

(B)(4) For lack of information denies the allegations contained in subparagraph (B)(4) of paragraph 5 of the petition.

(B)(5) For lack of information denies the allegations contained in subparagraph (B)(5) of paragraph 5 of the petition.

(B)(6) Denies the allegations contained in subparagraph (B)(6) of paragraph 5 of the petition.

(B)(7) Denies the allegations contained in subparagraph (B)(7) of paragraph 5 of the petition.

(B)(8) Denies the allegations contained in subparagraph (B)(8) of paragraph 5 of the petition.

(B)(9)(a) Admits the allegations contained in subparagraph (B)(9)(a) of paragraph 5 of the petition.

(B)(9)(b) For lack of information denies the allegations contained in subparagraph (B)(9)(b) of paragraph 5 of the petition.

(B)(9)(c) Admits the allegations contained in subparagraph (B)(9)(c) of paragraph 5 of the petition.

(B)(9)(d) For lack of information denies the allegations contained in subparagraph (B)(9)(d) of paragraph 5 of the petition.

(B)(9)(e) For lack of information denies the allegations contained in subparagraph (B)(9)(e) of paragraph 5 of the petition.

(B)(9)(f) For lack of information denies the allegations contained in subparagraph (B)(9)(f) of paragraph 5 of the petition.

(B)(9)(g) Admits the allegations contained in subparagraph (B)(9)(g) of paragraph 5 of the petition.

(B)(10)(a) Admits the allegations contained in subparagraph (B)(10)(a) of paragraph 5 of the petition.

(B)(10)(b) For lack of information denies the allegations contained in subparagraph (B)(10)(b) of paragraph 5 of the petition.

(B)(10)(c) For lack of information denies the allegations contained in subparagraph (B)(10)(c) of paragraph 5 of the petition.

(B)(10)(d) For lack of information denies the allegations contained in subparagraph (B)(10)(d) of paragraph 5 of the petition.

(B)(10)(e) Admits the allegations contained in

subparagraph (B)(10)(e) of paragraph 5 of the petition. [26]

(B)(11)(a) For lack of information denies the allegations contained in subparagraph (B)(11)(a) of paragraph 5 of the petition.

(B)(11)(b) For lack of information denies the allegations contained in subparagraph (B)(11)(b) of paragraph 5 of the petition.

(B)(11)(c) Admits the allegations contained in subparagraph (B)(11)(c) of paragraph 5 of the petition.

(B)(11)(d) For lack of information denies the allegations contained in subparagraph (B)(11)(d) of paragraph 5 of the petition.

(B)(11)(e) For lack of information denies the allegations contained in subparagraph (B)(11)(e) of paragraph 5 of the petition.

(B)(11)(f) For lack of information denies the allegations contained in subparagraph (B)(11)(f) of paragraph 5 of the petition.

(B)(12) Denies the allegations contained in subparagraph (B)(12) of paragraph 5 of the petition.

(C)(1) For lack of information denies the allegations contained in subparagraph (C)(1) of paragraph 5 of the petition.

(C)(2) For lack of information denies the allegations contained in subparagraph (C)(2) of paragraph 5 of the petition.

(D)(1) Admits the allegations contained in subparagraph (D)(1) of paragraph 5 of the petition.

(D)(2) Admits the allegations contained in subparagraph (D)(2) of paragraph 5 of the petition.

(D)(3) Denies the allegations contained in subparagraph (D)(3) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL TMM
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Acting Division Counsel.
T. M. MATHER,
Special Attorney, Bureau of
Internal Revenue.

TMM:emb 7/10/43

[Endorsed]: T.C.U.S. Filed July 16, 1943. [28]

[Title of Tax Court and Cause.]

MOTION FOR LEAVE TO FILE AMENDMENT
TO PETITION

Comes now the petitioner by its counsel of record and moves this Honorable Court to grant the said

petitioner leave to file the attached amendment to petition in the above entitled cause.

Dated: San Francisco, California, November 20, 1943.

FELIX T. SMITH
GRANVILLE S. BODEN
SCOTT C. LAMBERT

Attorneys for Petitioner.

Consent is hereby given to file the above mentioned amendment to petition in the above entitled cause.

.....

[Endorsed]: T.C.U.S. Filed Nov. 26, 1943. [29]

[Title of Tax Court and Cause.]

AMENDMENT TO PETITION

Petitioner hereby amends its petition filed with The Tax Court of the United States on June 17, 1943, in the above entitled cause in the following respects:

After paragraph 4(e) of the allegations of errors of said petition the following additional paragraph is added:

“4.(f) The failure to allow adequate additional deduction for capital stock tax which accrued as of July 1, 1940.”

After paragraph 5.(D) of the facts upon which petitioner relies in said petition the following additional paragraph is added:

“5.(E) Petitioner filed its capital stock tax return for the fiscal year ended June 30, 1941, with the Collector of Internal Revenue at San Francisco on October 29, 1941. The return disclosed a declared value of \$8,500,000 for its capital stock, upon which a tax liability of \$10,625 was computed at the rate of \$1.25 for each full \$1,000 of declared value. The said tax [30] liability was paid to the Collector of Internal Revenue on October 29, 1941, and no part thereof has been refunded.

In its income tax return for the calendar year 1940, petitioner erroneously claimed as a deduction capital stock taxes for the fiscal year ended June 30, 1941, in the sum of \$2,750 instead of \$10,625. Upon audit of petitioner's income tax return, the Commissioner allowed an additional deduction of \$7,001.60 for the capital stock tax for the fiscal year ended June 30, 1941, computed at the rate of \$1.10 for each \$1,000 as provided by the Revenue Act of 1940 (see Adjustment b, page 4, of the copy of the notice of deficiency). There has accordingly been allowed by the Commissioner capital stock taxes in the total amount of \$9,751.60. A further deduction of \$873.40 should be allowed by the Commissioner.”

Dated: San Francisco, California, November 20, 1943.

FELIX T. SMITH

GRANVILLE S. BORDEN

SCOTT C. LAMBERT

Attorneys for Petitioner. [31]

State of California,

City and County of San Francisco—ss.

B. W. Letcher, being first duly sworn, deposes and says: That he is an officer, to wit, the Secretary of Pacific Public Service Company, a corporation, the petitioner named in the foregoing action, and makes this verification for and on behalf of said corporation; that he has read the foregoing amendment to petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

B. W. LETCHER

Subscribed and sworn to before me this 20th day of November, 1943.

[Seal]

FRANK L. OWEN

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: T.C.U.S. Filed Nov. 26, 1943. [32]

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition in the above proceeding, admits and denies as follows:

4. (f) Admits that the respondent erred in failing to allow adequate additional deduction for capital stock tax which accrued as of July 1, 1940.

5. (E) Admits the allegations contained in paragraph 5 (E) of the amendment to petition.

(Signed) J. P. WENCHEL, H. D. T.

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel.

HAROLD D. THOMAS,

Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T. C. U. S. Filed Nov. 26, 1943. [34]

[Title of Tax Court and Cause.]

MOTION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P.

Wenchel, Chief Counsel, Bureau of Internal Revenue, and moves for leave to amend the answer to the petition by striking subparagraph (B)(9)(c) of paragraph 5 of the answer heretofore filed and substituting therefor the amendment which is attached hereto.

Wherefore, it is prayed that this motion be granted.

(Signed) J. B. WENCHEL, H. D. T.
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
HAROLD D. THOMAS,
Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T. C. U. S. Filed Nov. 26, 1943. [34]

[Title of Tax Court and Cause.]

AMENDMENT TO ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and, pursuant to leave first had and obtained, files the following amendment to the answer to the petition in the above-entitled case:

5. (B)(9)(c) Denies the allegations contained in subparagraph (B)(9)(c) of paragraph 5 of the petition.

(Signed) J. B. WENCHEL, H. D. T.

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel.

HAROLD D. THOMAS,

Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T. C. U. S. Filed Nov. 26, 1943. [35]

[Title of Tax Court and Cause.]

MOTION TO REOPEN RECORD FOR ADMISSION OF EVIDENCE MATERIAL SINCE THE ENACTMENT OF THE REVENUE ACT OF 1943.

Comes now the petitioner by its counsel of record, and respectfully moves this Court to reopen the record in this appeal for the admission of evidence relating to an issue which petitioner seeks to raise by reason of the Revenue Act of 1943, enacted since the hearing of this proceeding.

The issue involved in this appeal is the basis to petitioner of stock and bonds acquired in an insolvency reorganization under Section 77B of the Bankruptcy Act. Said stock and bonds were ac-

quired under the terms of the reorganization in exchange for bonds, preferred stock and a note owned by petitioner in the insolvent corporation, and in consideration of the extinguishment of the common stock of the insolvent corporation, all of which was owned by the petitioner.

Under the law prior to the Revenue Act of 1943 the question of gain or loss on the reorganization exchange and the basis to petitioner of securities received thereunder depended upon whether or not the exchange was in connection with a reorganization as defined in section 112 (g) (1) of the Revenue Act of 1934 or was a transfer to a controlled corporation under section 112 (b) (5) of the Revenue Act of 1934 as interpreted in Supreme Court decisions rendered in 1942.

The Revenue Act of 1943, which was enacted on February 25, 1944, contained in section 121 (b) and (c) new rules for the recognition of gain or loss to and prescribed the basis of share and security holders participating in an insolvent organization. Said new rules as to basis are retroactive to the years involved in this appeal.

Petitioner believes that under section 121 (b) and (c), petitioner's basis in said common stock in said insolvent corporation carried over and became part of the petitioner's stock and securities in the new corporation since under section 121 (b), such common stock was extinguished in consideration of the issuance of stock and securities in the new corporation organized to effectuate such plan of reorganization. Petition claimed no loss in respect of the

common stock under the law prior to the Revenue Act of 1943.

Petitioner has obtained the consent of counsel for respondent to the filing of this motion and to the reopening of the record as respectfully requested herein. [37]

Wherefore petitioner prays that this motion be granted.

Dated San Francisco, California, September 29, 1944.

G. S. BORDEN,
S. NIELSON,
SCOTT C. LAMBERT,
Counsel for Petitioner.

No objection to reopening of the record for the purpose herein stated:

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

[Endorsed]: T. C. U. S. Filed Oct. 12, 1944. [38]

[Title of Tax Court and Cause.]

MOTION

Petitioner hereby moves that leave be given to file its amended petition in this proceeding, attached hereto. In support of this motion, petitioner shows as follows:

The Revenue Act of 1943, which was enacted since

the filing of the original petition herein and the hearing of this case, contains new rules for the recognition of gain and loss arising from insolvency reorganizations. Under section 121 (c) of said Revenue Act of 1943 no loss was recognizable to petitioner in the 1935 reorganization of California Consumers Company by reason of the extinguishment of the common stock of said Company owned entirely by petitioner. Petitioner claimed no loss in respect of said common stock under the law prior to the Revenue Act of 1943. Nor did petitioner claim, in its petition herein, that its basis for said stock carried over to the stock and bonds of [39] the newly reorganized corporation sold by the petitioner in 1940.

Petitioner desires to amend its petition herein to add allegations of error and fact relating to its basis for said common stock.

Wherefore, it is prayed that this motion be granted.

Dated San Francisco, California, September 29, 1944.

SIGVALD NIELSON,
GRANVILLE S. BORDEN,
SCOTT C. LAMBERT,
Counsel for Petitioner.

No objection to the granting of the within motion.

J. P. WENCHEL,
Chief Counsel, Counsel for
Respondent.

[Endorsed]: T. C. U. S. Filed Oct. 12, 1944. [40]

[Title of Tax Court and Cause.]

AMENDMENT TO PETITION

The above named petitioner hereby amends its petition herein for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IRA: 90-D-C: TS: PD: SE: WGW) HEA dated March 26, 1923 as follows:

Paragraph 4 is amended to include the following additional assignment of error:

(f) The failure to include in petitioner's basis for its bonds and stock of the California Consumers Corporation sold in 1940, petitioner's basis for the common stock of California Consumers Company extinguished in the 1935 exchange, made pursuant to the plan of reorganization, under which petitioner received stock and bonds of the new California Consumers Corporation.

Subparagraph (B) (7) of paragraph 5 is amended to read as follows: [41]

(7) Petitioner's shares of common stock of the California Consumers Company were extinguished as an essential part of the reorganization under which petitioner received new bonds and new stock of the California Consumers Corporation.

Subparagraph (B) (10) of paragraph 5 is amended by adding after subparagraph (c) the following additional allegations of fact:

(f) Petitioner acquired 15,000 shares of the common stock of California Consumers Company in 1928 in consideration of the issuance of 300,000 shares of class B common stock of petitioner. Petitioner acquired a basis for said common shares of \$6,000, said basis being the basis of the transferors of said common shares of California Consumers Company. During the year 1930 the California Consumers Company increased its outstanding common shares to 25,000 by means of the declaration of a stock dividend of 10,000 shares and charged said dividend against earned surplus at the stated value of \$1.00 per share. Petitioner at the date of the reorganization owned 25,000 shares of common stock of the California Consumers Company for which it had a basis of \$6,000.

Dated September 29, 1944.

Respectfully submitted,

SIGVALD NIELSON

G. S. BORDEN

SCOTT C. LAMBERT

Counsel for Petitioner, [42]

State of California,

City and County of San Francisco—ss.

H. L. Farrar, being first duly sworn, deposes and says: That he is an officer, to wit: Vice President of Pacific Public Service Company, a corporation, the petitioner named in the foregoing action, and makes this verification for and on behalf of said corporation; that he has read the foregoing Amendment to Petition and knows the contents

thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

H. L. FARRAR

Subscribed and sworn to before me this 5th day of October, 1944.

(Seal)

FRANK L. OWEN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: T. C. U. S. Filed Oct. 12, 1944. [43]

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed by the above-named petitioner admits and denies as follows:

4 (f) Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraph (f) of paragraph 4 of amendment to petition.

5 (B) (7) Denies the allegations contained in subparagraph (B) (7) of paragraph 5 of amendment to petition.

5 (B) (10) (f) Admits the allegations contained in subparagraph (B) (10) (f) of paragraph 5 of amendment to petition.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHELL, TMM
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel;
T. M. MATHER,
Special Attorney, Bureau of Internal Revenue.

TMM:b 10/25/44

[Endorsed]: T. C. U. S. Filed Nov. 1, 1944. [44]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is mutually stipulated and agreed, by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true in this proceeding without prejudice to the right of either party to offer further evidence not inconsistent with the facts herein stipulated and subject further to the right of either party to object to any of the facts herein stipulated upon the ground of immateriality.

1. On September 25, 1940, and on October 7, 1940, petitioner sold to Turner Poindexter and Company of Los Angeles, all its bonds and shares of stock in California Consumers Corporation for amounts aggregating \$19,654.85 cash. The sales were arm's length transactions between a willing buyer and a willing seller. Since the date of this sale petitioner has not owned any bonds or shares of stock or any other interest in California Consumers Corporation. [45]

2. The amounts received for each, the cost basis claimed, and the loss claimed by petitioner on its return for the taxable year were as follows:

Item	Amount Received	Cost Basis Claimed on Return	Loss Claimed on Return
\$75,000 principal amount of bonds with participating certificates for 600 shares of stock held by voting trustees	\$18,750.00	\$54,877.66*	\$36,181.38
1353 shares stock	263.82	51,001.75	50,737.93
3287.5 shares stock.....	641.03	6,246.25	5,605.22
Total.....	\$19,654.85	\$112,125.66	\$92,524.53

* Expense of \$53.72 was also claimed.

In arriving at the cost basis of the 3287.5 shares on the return petitioner used a value of \$1.90 per share.

In the petition, petitioner claims a cost basis of \$478,270.00 (the amount of the note hereinafter referred to) for the 3287.5 shares above referred to.

3. The bonds and stock of the California Consumers Corporation sold by petitioner in the year

1940 were acquired by petitioner in the year 1935 pursuant to an agreement dated March 1, 1935, entitled "Plan of Reorganization of California Consumers Company", a copy of which is attached hereto, marked Exhibit "1-A", and made a part hereof. [46] The plan of reorganization set forth in the agreement dated March 1, 1935, was formulated and proposed by committees representing the bondholders, the preferred stockholders, and the petitioner as unsecured creditor of California Consumers Company. The plan, provisions and terms of this agreement were confirmed by the United States District Court for the Second District of California, Second Division, on September 30, 1935, and carried out and consummated in 1935 under the provisions of Section 77-B of the Federal Bankruptcy Act.

4. All the interested parties accepted the plan. In accordance with the provisions of the plan requiring a new corporation, California Consumers Corporation was organized in 1935, under the laws of the State of California, and, thereafter, in 1935, acquired the properties referred to in said plan which constituted all, or substantially all, the properties which had been owned and operated by California Consumers Company, and issued \$3,496,500 principal amount of bonds and 54,274 shares of stock, as provided in Article III thereof.

The parties who, prior to the said plan, held bonds, stock and note of California Consumers Company, received pursuant to the plan the follow-

ing interests in California Consumers Corporation: [47]

Holdings in California Consumers Company	Interest in California Consumers Corporation Bonds	Common Stock
\$3,496,500 principal amount of bonds (of which \$75,- 000 principal amount were held by petitioner)	\$3,496,500 prin- cipal amount of bonds	27,972 participating certificates for 29, 972 shares of stock
15,343 shares no par value preferred stock (of which 902 shares were held by petitioner)	None	23,014.5 shares
\$478,270 unsecured demand note (held by petitioner)	None	3,287.5 shares
25,000 shares common stock held by petitioner).....	None	None
Totals.....	\$3,496,500 bonds	54,274 shares

No cash or other consideration was paid by California Consumers Corporation to any bondholder, stockholder or noteholder except that specifically provided for in the plan.

5. The California Consumers Company, a Delaware corporation, was organized on March 20, 1928. It operated both directly and indirectly through various subsidiary companies an extensive ice and cold storage business in Southern California. Operations by the California Consumers Company resulted in losses, and in December, 1933, it was insolvent. Excepting liabilities to the subsidiary and affiliated companies, its liabilities at that time were as follows: [48]

\$3,496,500 principal amount First Mortgage Series "A" bonds dated April 2, 1928, of which petitioner held \$75,000 principal amount.

\$478,270 unsecured promissory note, held by petitioner.

At such time it had stock outstanding as follows:

15,343 shares \$7.00 cumulative preferred stock, no par value, of which petitioner held 902 shares.

25,000 shares of no par common stock, held by petitioner.

6. On October 1, 1933, California Consumers Company defaulted in the payment of the semi-annual interest due on said First Mortgage Series "A" bonds. Accordingly, on December 2, 1933, the Security-First National Bank of Los Angeles, the trustee to the indenture securing the bonds of the California Consumers Company, filed a bill of complaint for the foreclosure of the indenture in the United States District Court at Los Angeles, and requested the appointment of a receiver of the properties ancillary to and pending the outcome of the foreclosure action. The court appointed on that day a receiver of the properties, and the properties were, thereafter, until the consummation of the aforesaid agreement dated March 1, 1935, operated by the receiver. [49]

7. In 1928, petitioner acquired 15,000 shares of common stock of the California Consumers Company, which constituted, at that time, all the issued and outstanding shares of common stock. On June

10, 1930, it acquired 10,000 additional shares of common stock by reason of a declaration of a dividend of 10,000 shares on said 15,000 shares. Petitioner thereafter, until the time of the transaction covered by the agreement dated March 1, 1935, held all the issued and outstanding common stock of the California Consumers Company consisting of 25,000 shares.

8. At various intervals between April, 1931, and July, 1933, petitioner acquired a total of 902 shares of preferred stock of the California Consumers Company at a cost of \$51,001.75, and bonds of said Company in the principal amount of \$75,000.00, at a cost of \$54,877.66. Said purchases were made on the open market. Said shares and bonds were held by petitioner up to the time of the transaction covered by the agreement dated March 1, 1935.

9. Prior to May 31, 1933, the petitioner had made cash advances to the California Consumers Company which totaled \$478,270.00. On that date the California Consumers Company made and signed a promissory note (payable on demand and bearing interest at 5% per annum) in the amount of \$478,270.00 in favor of the petitioner, evidencing an indebtedness of that amount. The petitioner, prior to the aforesaid agreement, dated March 1, [50] 1935, had not received any cash or other property in payment in whole or in part of these loans.

10. Subsequent to the acquisition by the petitioner of stock of California Consumers Corporation, no distributions were made by said corporation which would affect the basis for gain or loss upon the sale of such stock in the taxable year.

Without admitting that no distributions from capital were made by California Consumers Company on its preferred stock prior to the agreement dated March 1, 1935, respondent agrees that for the purpose of computing the petitioner's tax liability involved in this proceeding, and for that purpose only, no adjustments to any basis otherwise allowable are to be made for any distributions on preferred stock from said company to petitioner between the time of petitioner's acquisition of preferred stock of said company and the agreement of March 1, 1935. The word "distributions", as used in this paragraph, does not embrace any transactions occasioned by the receivership and the carrying out and the consummating of the agreement dated March 1, 1935.

11. The petitioner has never claimed any portion of the unsecured indebtedness of the California Consumers Company as partially or wholly worthless in any of its income tax returns, nor has petitioner received any tax benefits through bad debt deductions with respect thereto. No part of the petitioner's cost of preferred stock and bonds of the California Consumers Company, or of its common stock and bonds of the California Consumers Corporation, has been claimed or allowed as a [51]

deduction, or otherwise, in any tax return filed by petitioner prior to the year 1940.

Petitioner reported a net loss in its Federal income tax return for each of the calendar years 1933, 1934, and 1935, and no tax has been paid by petitioner for these years.

12. As of December 31, 1933, petitioner wrote down its investment in the bonds of California Consumers Company to \$15,000.00, petitioner's estimate of their fair market value as of December 31, 1933, and wrote down the balance of its investments and note to \$1.00.

13. By reason of its respective holdings of bonds, stock and note of California Consumers Company prior to the carrying out of the plan, petitioner, as the result of the consummation of said plan, dated March 1, 1935, received the following:

Holdings in California Consumers Company	Received holding in California Consumers Corporation
\$75,000.00 principal amount of bonds	\$75,000.00 principal amount of bonds with participating certi- ficates for 600 shares of com- mon stock held by voting trus- tees
902 shares preferred stock	1353 shares of common stock
\$478,270.00 note—unsecured	3287.5 shares of common stock
25,000 shares common stock	Nothing

The bonds and stock of California Consumers Corporation which petitioner received, as stated above, were the bonds and stock which were sold

by petitioner as set forth in paragraphs 1 and 2 hereof.

14. The provisions of the bonds of the California Consumers Corporation are set forth in Article IV of the agreement dated March 1, 1935.

The first and only issue of bonds by California Consumers Company were first mortgage bonds and were designated as the "First Mortgage and First Lien Gold Bonds, Series A". Said bonds were dated April 1, 1928, and, subject to provision for earlier redemption, matured twenty years from said date. Series A bonds outstanding were in the principal amount of \$3,496,500. Interest was due thereon from April 1, 1928, at the rate of 6% per annum, payable semi-annually upon April 1st and October 1st of each year.

The Company reserved the right to redeem the bonds before maturity upon the payment of the principal thereof, plus accrued interest and a premium of 5% for redemption within the first ten years, less $\frac{1}{2}\%$ per year for redemption within each year after April, 1939.

Said Series A bonds issue obligated the Company to deposit a service charge into a sinking fund for the purchase and/or [53] redemption of Series A bonds. In lieu of making the required sinking fund payment in cash, the Company could, at its option, deposit with the trustee for the sinking

fund, Series A bonds, and receive credit therefor to the extent of the cost of the bonds so surrendered.

SIGVALD NIELSON
GRANVILLE S. BORDEN
SCOTT C. LAMBERT

Counsel for Petitioner.

J. P. WENCHEL

Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

EXHIBIT A-1

PLAN OF REORGANIZATION OF CALIFORNIA CONSUMERS COMPANY

March 1, 1935

Bondholders Protective Committee: W. D. Court-right, Edward L. Eyre, John Earle Jardine, Floyd C. Merritt, Guy Witter. Harry R. Wiley, Secretary, 634 South Spring Street, Los Angeles, California. Telephone VAndike 6111. O'Melveny, Tuller & Myers, 433 South Spring Street, Los Angeles, California. Counsel. Bank of America National Trust and Savings Association, 660 South Spring Street, Los Angeles, California. Depository.

Preferred Stockholders Committee: Garrettson Dulin, Wyatt H. Allen, John Bullard, Herbert E. Hall, Catesby C. Thom. M. K. Pattison, Secretary, 900 California Bank Building, Los Angeles, California. Telephone TRinity 4711. Chandler, Wright & Ward, 210 West Seventh Street, Los Angeles,

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California. Counsel. California Trust Company,
629 South Spring Street, Los Angeles, California.
Depository. [55]

Approved by Federal Court, September 30, 1945.

Plan of Reorganization for California Consumers
Company.

Article I.

DEFINITIONS.

When used in this plan, unless the context otherwise requires, the following terms shall have the following meanings:

“Debtor” means California Consumers Company, a Delaware corporation.

“Present bonds” means First Mortgage and First Lien Twenty-Year 6% Gold Bonds, Series A, dated as of April 2, 1928, executed by California Consumers Company.

“Properties” means all property now or hereafter subject to the indenture and/or supplemental indenture, both dated as of April 2, 1928, executed by said California Consumers Company to Los Angeles-First National Trust & Savings Bank as Trustee, for the purpose of securing the present bonds.

“Present indenture” means said indenture of April 2, 1928, as supplemented by said supplemental indenture of the same date.

“Bondholders” means the owners and holders of the present bonds.

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“Bondholders’ agreement” means California Consumers Company Bondholders’ Protective Agreement dated as of May 1, 1934, between W. D. Courtright, Edward L. Eyre, John Earle Jardine, Floyd C. Merritt and Guy Witter as the Committee, and such holders of the present bonds as have and shall become parties thereto as therein provided.

“Bondholders’ committee” means the Committee (as now or hereafter constituted) constituted by and acting under the bondholders’ agreement.

“Preferred stock” means the \$7 cumulative preferred stock, without par value, heretofore issued by California Consumers Company and now outstanding.

“Preferred stockholders” means the owners and holders of the preferred stock.

“Preferred stockholders’ agreement” means California Consumers Company Preferred Stockholders’ Protective Agreement dated as of May 1, 1934, between Garrettson Dulin, Wyatt H. Allen, John Bullard, Herbert E. Hall and Catesby C. Thom as a Committee, and such preferred stockholders as have and shall become parties thereto as therein provided.

“Preferred stockholders’ committee” means the Committee (as now or hereafter constituted) constituted by and acting under the preferred stockholders’ agreement.

“New bonds” means the new bonds to be issued pursuant to this plan.

“New trust indenture” means the indenture to

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be executed pursuant to this plan to secure the new bonds.

“New corporation” means the new corporation which may be formed pursuant to this plan for the purpose of acquiring the properties, issuing the new bonds, executing the new trust indenture and issuing the new stock.

“New stock” means the stock to be issued by the new corporation.

“Voting trustees” means the trustees (including their successors) to whom is to be issued that proportion of the new stock to be issued for the benefit of the bondholders.

“Participating certificates” means certificates to be issued by the voting trustees, pursuant to this plan, representing the new stock to be issued to the voting trustees for the benefit of the bondholders.

“Present trustee” means Security-First National Bank of Los Angeles, a national banking association, or its successor, as trustee under the present indenture.

“Trustee” means the trustee under the new trust indenture.

“Dividend suit” means the suit filed on December 29, 1933, in the Superior Court of the State of [56] California in and for the County of Los Angeles, No. 367553, entitled “Guy L. Goodwin as Receiver and Security-First National Bank of Los Angeles as Trustee, et al., Plaintiffs, vs. Pacific Public Service Company, a corporation, et al.,

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Defendants,” seeking the recovery of the amount of certain dividends alleged to have been illegally declared and paid on both preferred and common stock of California Consumers Company, amounting to the sum of approximately \$1,000,000.

“Section 77B” means Section 77B of the act of July 1, 1898 entitled “An act to establish a uniform system of bankruptcy throughout the United States,” as heretofore or hereafter amended.

“Reorganization proceedings” means the proceedings which may be instituted for a reorganization of the debtor under Section 77B, for the purpose of consummating this plan.

“Court” means the court in the reorganization proceedings, and the “judge” means the judge of said court.

“Reorganization trustee” means the trustee who may be appointed by the judge in the reorganization proceedings.

“Receiver” means Guy L. Goodwin or his successor, as the receiver heretofore appointed by the United States District Court for the Southern District of California, Central Division, in the action entitled “Security-First National Bank of Los Angeles, as Trustee, Plaintiff, vs. California Consumers Company, a corporation, Defendant,” (In Equity No. 122-C) heretofore instituted by the present trustee for the foreclosure of the present indenture.

“Subsidiary companies” means companies all of the outstanding shares of which (except for direc-

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tors' qualifying shares) are owned by California Consumers Company.

"Affiliated companies" means companies (other than subsidiary companies) in the same line of business in which California Consumers Company owns a stock interest.

The term "creditors" shall include for all purposes of the plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts whether or not such claims would otherwise constitute provable claims under the Federal Bankruptcy Act, and the term "claims" includes debts, securities, other than stock, liens or other interest of whatever character.

Article II.

Introductory.

California Consumers Company (herein called "the debtor") owned, and prior to December 2, 1933 operated, both directly and through its various subsidiary companies, an extensive ice and cold storage business in Southern California. Excepting liabilities incurred by the receiver and liabilities to the subsidiary and affiliated companies, the debts and outstanding stock of the debtor are as follows:

\$3,496,500 principal amount of present bonds secured by the present indenture;

An unsecured promissory note or notes in the

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aggregate principal amount of \$478,270.00 held by Pacific Public Service Company;

15,343 shares of preferred stock held by the public generally;

25,000 shares of common stock held (with the possible exception of directors' qualifying shares) by Pacific Public Service Company.

On December 2, 1933, the present trustee filed its bill of complaint for the foreclosure of the present indenture in the United States District Court at Los Angeles, California, and requested the appointment of a receiver of the properties ancillary to and pending the outcome of the foreclosure action. On the same day the Honorable Wm. P. James, judge of said court, appointed Guy L. Goodwin receiver of the properties, and the properties was thereafter operated and are still being operated by said receiver.

The plan now proposed has been prepared by the bondholders' committee and the preferred stockholders' committee and has been agreed to by Pacific Public Service Company and the debtor. It contemplates a reorganization to be consummated through proceedings under Section 77B. Upon approval of the plan by the holders of at least two-thirds in principal amount of the present bonds, a reorganization proceeding under Section 77B will be instituted by the debtor for the purpose of consummating the plan, subject to its confirmation by the court in the reorganization proceedings. If for any reason it shall become necessary or desir-

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able, in the judgment of the bondholders' committee, that the plan be carried out otherwise than in such reorganization proceedings, then the plan shall be carried into effect in such manner as to accomplish independently of the reorganization proceedings substantially similar results for the bondholders and preferred stockholders participating in the plan.

Except as otherwise expressly stated, the provisions herein contained have been prepared in contemplation of carrying the plan into effect in the reorganization proceedings; and so long as substantially similar results are obtained for bondholders and preferred stockholders participating in the plan, no amendment or modification of the plan made necessary or desirable in order to carry it into [57] effect otherwise than in the reorganization proceedings shall be deemed to affect adversely the bondholders or the preferred stockholders or to confer on such holders any right to withdraw from the plan.

ARTICLE III.

THE PLAN IN GENERAL.

New Corporation to Acquire Properties.

The properties will be transferred to or acquired by the new corporation free and clear of all claims of the debtor, its stockholders and creditors, except liabilities incurred by the receiver and obligations of the debtor to its subsidiaries and affiliated companies which are to be assumed as provided in

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Article IX hereof. The new corporation will have the following capitalization:

\$3,496,500.00 principal amount of new bonds (described in Article IV below):

54,274 shares of new stock to be presently issued and to be divided between the bondholders,

Pacific Public Service Company, and preferred stockholders' as follows:

Bondholders—27,972 shares (or approximately 52% of all of the new stock to be issued), to be represented by participating certificates issued under the voting trust agreement described in Article V below.

Pacific Public Service Company—3,287.5 shares (or approximately 6% of all of the new stock to be issued).

Preferred stockholders—23,014.5 shares (or approximately 42% of all of the new stock to be issued).

Treatment of Existing Security Holders and
Creditors.

Bondholders. The rights of the bondholders shall be modified and altered by the conveyance and transfer to the new corporation of the properties free and clear of all claims (with the aforementioned exceptions) of the debtor, its stockholders and creditors, and by the issuance by the new corporation of new securities in exchange for the bonds held by them, as follows:

For each \$1,000, principal amount, of present

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bonds with all appurtenant coupons maturing on and after October 1, 1933—\$1,000, principal amount, of new bonds; and Participating certificates for 8 shares of new stock.

For each \$500, principal amount, of present bonds with all appurtenant coupons maturing on and after October 1, 1933—\$500, principal amount, of new bonds; and Participating certificates for 4 shares of new stock.

If the plan is carried into effect in the reorganization proceedings, it will not become effective unless and until it shall have been accepted in the manner provided in Section 77B by or on behalf of the holders of two-thirds in amount of the present bonds and confirmed by the court, but upon such confirmation it shall be binding upon all holders of the present bonds, including those who have not, as well as those who have, accepted it.

Upon consummation of the plan, all rights of the holders of the present bonds (except the right to receive the new securities) and all coupons appurtenant to said bonds, shall pass to the new corporation. The present bonds will be assigned and transferred to the new corporation and by it to the trustee under the new trust indenture, to be held as additional and collateral security for the new bonds.

Unsecured Creditors. The rights of Pacific Public Service Company, as an unsecured creditor of the debtor, shall be modified and altered by the conveyance and transfer to the new corporation of

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the properties free and clear of all claims (with the aforementioned exceptions) of the debtor, its stockholders and creditors, and by the issuance by the new corporation of 3,287.5 shares of the new stock to Pacific Public Service Company in exchange for its unsecured claim against the debtor. The claims of any unsecured creditors other than Pacific Public Service Company shall not be affected by the plan, within the meaning of Section 77B.

Preferred Stockholders. The rights of the preferred stockholders of the debtor shall be modified and altered by the conveyance and transfer to the new corporation of the properties free and clear of all claims (with the aforementioned exceptions) of the debtor, its stockholders and creditors and by the issuance by the new corporation of new securities in exchange for the preferred stock held by them, as follows:

For each share of preferred stock, with all dividends accumulated and unpaid thereon—1.5 shares of new stock.

Common Stock. The rights of the common stockholders of the debtor shall be modified and altered by the conveyance and transfer to the new corporation of the properties free and clear of all claims (with the aforementioned exceptions) of the debtor, its stockholders and creditors. No new securities shall be issued to the common stockholders. Pacific Public Service Company, as the holder of all of the outstanding [58] common stock of the debtor

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(except qualifying shares of directors), by accepting this plan shall waive whatever right it might have to claim participation in the plan by virtue of its ownership of the common stock of the debtor.

Disposition of Dividend Suit. The dividend suit shall be dismissed with prejudice to all parties plaintiff therein and such dismissal with prejudice shall be binding upon all bondholders and preferred stockholders of the debtor; any and all other claims of the Receiver and/or bondholders and/or preferred stockholders of the debtor against Pacific Public Service Company shall be released.

If the holders of less than a majority of the preferred stock of the debtor shall accept the plan, then (unless the judge shall determine either that the debtor is insolvent or that the interest of the preferred stockholders will not be affected adversely by the plan), protection for the realization by them of the value of their equity, if any, in the properties shall be provided either by a sale of the properties at not less than a fair upset price to be fixed by the judge, or by appraisal and payment in cash of the value of their preferred stock, or at the objecting preferred stockholders' election, of the new stock allotted to them under the plan, whichever method the judge determines will do substantial justice to such preferred stockholders under and consistent with the circumstances of this particular case.

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Article IV.

PROVISIONS OF NEW BONDS AND OF
NEW TRUST INDENTURE.

1. The new bonds shall be dated as of such date as the bondholders' committee shall designate and, subject to provisions for earlier maturity by reason of redemption, acceleration of maturity, or otherwise, shall mature twenty (20) years from their date. The authorized principal amount of the new bonds shall be \$3,496,500.00. The new bonds shall bear interest at the rate of five per cent (5%) per annum, the first payment of interest to be due eight (8) months after the date of the new bonds. Of said interest at the rate of five per cent (5%) per annum, interest at the rate of three per cent (3%) per annum shall be fixed (i.e., unconditionally due) and payable in semiannual installments and the balance of the annual interest shall be payable in annual installments but only if and to the extent that the net income of the new corporation and its subsidiaries on a consolidated basis, as determined by annual audit, for the twelve (12) months period ended two (2) months preceding the annual income interest payment date, is available for the payment of interest. That part of the interest which shall be unconditionally due and payable at the rate of three per cent (3%) per annum, as aforesaid, is hereinafter referred to as "fixed interest" and that part of the interest which is payable only out of such available net income

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is hereinafter referred to as "income interest." Net income shall be deemed to be available for the payment of income interest only if the payment thereof will not reduce the net working capital of the new corporation and its subsidiaries on a consolidated basis, to an amount insufficient for the needs of the business as determined from time to time by the board of directors and, so long as the voting trust agreement is in existence, approved by at least a majority of the voting trustees. The new trust indenture may provide that distributions of income interest to bondholders need be made only in multiples of one-fourth of one per cent ($\frac{1}{4}$ of 1%) of the principal amount of the outstanding new bonds. Income interest not earned and available as aforesaid in any annual period shall not accumulate.

2. The new bonds shall be secured by a new trust indenture in the nature of a trust deed and/or mortgage and/or chattel mortgage and/or pledge upon all of the properties to be acquired by the new corporation, subject only to the lien of taxes, street bonds and/or assessments not delinquent; any and all leases; easements, conditions, reservations, restrictions, covenants, and rights of way; and other matters, if any, which shall be approved or authorized by the bondholders' committee. Such new trust indenture shall be executed by the new corporation and shall designate such trustee as the bondholders' committee shall select, with such powers, duties, rights, privileges, and immunities

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as shall be provided in the new trust indenture. The trustee shall be such bank or trust company with offices in Los Angeles, California, as may be designated by the bondholders' committee. The trustee shall be entitled to reasonable compensation for its services.

3. The new bonds shall either bear coupons evidencing the fixed and income interest, registerable as to principal only, or if the bondholders' committee shall so determine, shall be registered both as to principal and interest.

4. The new trust indenture shall provide for the establishment of a sinking fund with the trustee thereunder, in which the new corporation shall deposit annually, commencing not later than fourteen (14) months after the date of the new bonds, cash equal to an amount arrived at by adding to one-half ($\frac{1}{2}$) of the consolidated net income of the new corporation and its subsidiaries (computed for sinking fund purposes as hereinafter provided) for the twelve (12) months ending two (2) months preceding such sinking fund payment date, the total amount of the provision for depreciation and obsolescence deducted in computing said net income, and subtracting from such sum the total amount of any expenditures during such twelve (12) months for additions, betterments, renewals and replacements [59] charged to asset or depreciation reserve accounts on the books of the new corporation and/or its subsidiaries, except amounts received from the sale of capital assets and expended

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during such period for additions and/or betterments; provided, however, that to the extent that the board of directors of the new corporation, with the approval, so long as the voting trust agreement is in existence, of a majority of the voting trustees, determines that any such payment would reduce the consolidated net working capital of the new corporation and its subsidiaries to an amount not sufficient for the needs of the business or would impair the ability of the new corporation to provide for reasonably anticipated expenditures for additions, betterments, renewals and/or replacements, no such sinking fund payment shall be required.

In lieu of making any required sinking fund payment in cash, the new corporation may at its option surrender new bonds to the trustee for cancellation, and it shall then be entitled to receive credit on its sinking fund obligations to the extent of its actual cost of the new bonds so surrendered, as certified to the trustee by at least two officers of the new corporation.

The sinking fund payments shall be cumulative only to the extent that any amount computed as above described which is not paid on a sinking fund payment date, because determined as aforesaid to be necessary for working capital and/or additions, betterments, renewals and/or replacements, shall be subsequently paid in full into the sinking fund before any dividends may be declared or paid on the new corporation's outstanding stock.

The amount of the consolidated net income of the

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new corporation and its subsidiaries shall be their net income (excluding profits and losses on disposition of capital assets) computed in accordance with good accounting practice; and without limiting the generality of that expression, such net income shall be computed to sinking fund purposes after deducting:

(a) All current operating expenses in connection with the business, including, in accordance with good accounting practice, provision for reasonable reserves for depreciation and obsolescence, and the payment or provision for all taxes and assessments (including but not limited to general taxes, income and franchise taxes);

(b) Fixed and income interest at rates not exceeding in the aggregate five per cent (5%) per annum on the outstanding new bonds;

(c) Repairs, maintenance, replacements and renewals in connection with the properties, except as the same may be paid from insurance or condemnation moneys or depreciation and/or obsolescence reserves;

(d) The fees, charges and expenses of the trustee (not including acceptance, authentication and registration fees in connection with the original acceptance of the trust and the original issuance of the new bonds, which fees are to be paid as part of the reorganization expenses and from funds to be provided for that purpose); compensation of the voting trustees and of their depositary and

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agent, and all other expenses of such voting trustees and of such voting trust; and all expenses in connection with the transfer of the stock of the new corporation.

The amount of the consolidated net income of the new corporation and its subsidiaries for the purpose of income interest payments shall be computed in the same manner as for sinking fund purposes, except that the amount of the income interest in item (b) above shall not be deducted in making such computation.

All sums received by the new corporation and/or its subsidiaries from the sale of capital assets shall be applied to one or more of the following purposes: (a) purchase and retirement of the new bonds; (b) deposit in the sinking fund; and (c) acquisition of capital assets. The new corporation shall be entitled to no credit whatsoever upon its sinking fund obligations by reason of any such application of sums received from the sale of capital assets.

5. The new trust indenture shall provide that the new corporation shall file with the trustee on or before the tenth (10th) day preceding each semi-annual interest payment date schedules and reports sworn to be correct by an officer of the new corporation, showing in reasonable detail the net income of the new corporation and its subsidiaries on a consolidated basis for the six (6) months period ended two (2) months preceding such inter-

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est payment date, and the balance sheet of the new corporation and its subsidiaries on a consolidated basis at the end of said period, together with schedules showing the computation and the amount, if any, required for deposit with the trustee in the sinking fund aforesaid, and such other information as the trustee shall require; and that the new corporation shall file with the trustee on or before the tenth (10th) day preceding each sinking fund payment date, similar schedules and reports certified by public accountants satisfactory to the trustee covering the operations for the twelve (12) months ended two (2) months preceding such sinking fund payment date. Such schedules and reports as may be rendered by public accountants as aforesaid shall be determinative. The trustee and its representative shall have access to the books of the new corporation and its subsidiaries and of the property subject to the new trust indenture at any time or times [60] for the purpose of making examination of the same, and such books and records and the schedules and reports above referred to shall be in such form and shall contain such data as may be required by the trustee.

6. Moneys deposited in the sinking fund shall be used from time to time by the trustee for the retirement of the new bonds either by purchase at public or private sale, at prices not exceeding the redemption price thereof, or by redemption in such manner and upon such notice as the new trust indenture may provide, at prices not exceeding the

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par value thereof, together with any accrued and unpaid fixed interest thereon.

7. The new trust indenture shall provide that with the consent of the holders of seventy-five per cent (75%) in principal amount of new bonds then outstanding:

(a) The new trust indenture may be released and the new bonds satisfied (but only with the written consent of the Commissioner of Corporations of the State of California so long as there is such a commissioner) upon payment or delivery to the trustee for the benefit of the holders of all the new bonds then outstanding, of a consideration (which may be money, securities or any other consideration), which consideration may be less than the principal amount of the new bonds then outstanding;

(b) With the consent of the new corporation and the trustee, any of the terms and provisions of the new trust indenture or the new bonds may be altered, eliminated or supplemented; or

(c) The new trust indenture may be subordinated to a new mortgage or trust deed or other encumbrance for such purposes and in such amount as such percentage of the holders of the new bonds then outstanding shall approve.

8. The new bonds and the new trust indenture shall otherwise be in such form and shall contain such terms, provisions and covenants, not inconsistent with the terms hereof, as the bondholders' committee may determine.

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V.

PROVISIONS OF VOTING TRUST
AGREEMENT

The new stock to be issued for the benefit of the bondholders will be issued to voting trustees under a voting trust agreement and participating certificates shall be issued by the voting trustees to the bondholders representing the new stock to which they are entitled. The voting trust agreement shall be executed by the voting trustees and the new corporation. The voting trust agreement shall endure for a period of twenty-one years unless earlier terminated (a) by a majority of the voting trustees; or (b) by instruments in writing executed (1) by the holders of participating certificates representing fifty per cent or more of the new stock held under the voting trust and (2) by the holders of fifty per cent or more of the aggregate principal amount of the new bonds then outstanding.

The initial voting trustees shall be designated by the bondholders' committee. The voting trust agreement will provide that at any time any one of the voting trustees may be removed by a majority of the voting trustees and that at any time one or more of the voting trustees may be removed by instruments in writing executed (1) by the holders of participating certificates representing fifty per cent or more of the new stock held under the voting trust and (2) by the holders of fifty per cent or more of the aggregate principal amount of the new bonds then outstanding; and also that in the event of the

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death, resignation, incapacity to act or removal of any voting trustee or voting trustees, successor or successors may be appointed by the remaining voting trustees or voting trustee, but that in the event no such appointment is made within thirty (30) days from and after the death, resignation, incapacity to act or removal of any voting trustee, a successor may be appointed by instruments in writing executed (1) by the holders of participating certificates representing fifty per cent or more of the new stock held under the voting trust and (2) by the holders of fifty per cent or more of the aggregate principal amount of the new bonds then outstanding.

The voting trustees shall be entitled to reasonable compensation for their services, but for their usual and ordinary services the compensation of each voting trustee shall not exceed \$20.00 per meeting. The depositary and agent of the voting trustees shall be such Los Angeles bank or trust company as may be designated by the voting trustees, and such depositary and agent shall be entitled to reasonable [61] compensation. The compensation of the voting trustees and of their depositary and agent, and all other expenses of the voting trustees and of the voting trust, shall be payable by the new corporation from the operating receipts of its property. If unpaid, such compensation and expenses shall constitute a lien on the stock issued to the voting trustees.

The voting trustees shall possess, and in their dis-

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cretion shall be entitled to exercise, all rights and powers of the holders of the new stock held under the voting trust agreement; provided, however, that in the event the voting trustees shall propose (a) to sell all or substantially all of the properties of the new corporation or the new stock held under the voting trust agreement and/or (b) to lease, transfer, convey, mortgage or encumber all or substantially all of the properties of the new corporation, such proposal shall be first mailed to the holders of the participating certificates and of the new bonds, if any, then outstanding; and in the event within thirty (30) days thereafter written dissents to such proposal shall be filed with the depositary and agent executed (1) by the holders of participating certificates representing fifty per cent or more of the new stock held under the voting trust and (2) by the holders of fifty per cent or more of the aggregate principal amount of the new bonds then outstanding, then in such case the voting trustees shall not have the right to consummate the proposal so submitted. The voting trustees may in their discretion, but shall not be required to, submit in like manner and with like effect any proposal which they shall deem substantially to affect the rights or interests of the new corporation or of the holders of securities issued by it.

The voting trust agreement may be amended by resolution of all of the voting trustees, but if in their opinion (which shall be conclusive) such amendment will materially or substantially affect the rights of the holders of participating certificates,

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the trustees shall mail notice of such proposed amendment to the holders of the participating certificates and of the new bonds, if any, then outstanding, and such amendment shall not become effective if within thirty (30) days thereafter written dissents to such amendment shall be filed with the depository and agent executed (1) by the holders of participating certificates representing fifty per cent or more of the new stock held under the voting trust and (2) by the holders of fifty per cent or more of the aggregate principal amount of the new bonds then outstanding.

The voting trust agreement shall be in such form and contain such terms, provisions and covenants not inconsistent with the terms hereof as the bondholders' committee may determine.

VI.

PAYMENT OF CLAIMS, COSTS OF ADMINISTRATION AND ALLOWANCES

No claims are to be paid in cash, in whole or in part, pursuant to this plan except those claims, if any, representing current bills and charges of the receiver remaining unpaid at the time of the commencing of the reorganization proceedings and the appointment of the reorganization trustee, but all costs of administration and other allowances made by the court shall be paid in cash. The bondholders' committee shall be entitled to compensation for its services in an amount not exceeding that provided for by the bondholders' agreement. The preferred

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stockholders' committee shall be entitled to such reasonable compensation for its services as the court may allow. The disbursements, liabilities and expenses of the bondholders' committee and of the preferred stockholders' committee, including the compensation and expenses of their respective attorneys, in such amounts as the respective committees shall determine, and the compensation of the respective committees will be paid as part of the expenses of the reorganization.

VII.

METHODS OF BECOMING A PARTY
TO THE PLAN

A. Holders of present bonds not heretofore deposited under the bondholders' agreement: Holders of the present bonds not heretofore deposited under the bondholders' agreement may approve and accept the plan by depositing their bonds with the depositary under the bondholders' agreement, unless the bondholders' committee shall have directed such depositary not to accept additional deposits at such time, or by filing, if the bondholders' committee shall so determine, with the bondholders' committee a written approval and acceptance of the plan in the form designated by the bondholders' committee, [62] and by making such deposit or filing such approval and acceptance, will authorize the bondholders' committee on their behalf to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to carry

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the plan into effect during the reorganization proceedings or otherwise, as herein provided.

Holders of the present bonds may approve and accept the plan in the reorganization proceedings by such other method as may be specified by the judge.

B. Holders of certificates of deposit heretofore issued under the bondholders' agreement: All depositors of the present bonds who shall not file dissents to the plan and notices of withdrawal of their bonds from the bondholders' agreement as provided therein, and within the time therein provided, shall thereby be deemed and treated as assenting to and bound by the plan and shall thereby authorize the bondholders' committee on their behalf to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to consummate the plan either in the reorganization proceedings or otherwise, as herein provided.

Prior to the submission of this plan to the present bondholders, it will have been approved by the court in the foreclosure action in which the receiver has heretofore been appointed and will have been filed with the depository under the bondholders' agreement. Copies of the plan are to be mailed to each depositing bondholder in the manner provided in subparagraph (a), Section IV, of the bondholders' agreement. The adoption of this plan by the bondholders' committee shall constitute the adoption of a revised plan and/or amendment of the plan of reorganization set forth in Section III of the bond-

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holders' agreement, and shall constitute an amendment of the bondholders' agreement expressly authorizing the bondholders' committee, on behalf of all holders of certificates of deposit heretofore issued who shall not file dissents and notices of withdrawal as provided in the bondholders' agreement and within the time therein provided, and on behalf of all holders of certificates of deposit hereafter issued, to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to consummate the plan either in the reorganization proceedings or otherwise, as herein provided.

C. Preferred stockholders whose stock has not heretofore been deposited under the preferred stockholders' agreement: Preferred stockholders who have not heretofore deposited their stock under the preferred stockholders' agreement may approve and accept the plan by depositing their preferred stock with the depositary under the preferred stockholders' agreement, unless the preferred stockholders' committee shall have directed such depositary not to accept additional deposits at such time, or by filing, if the preferred stockholders' committee shall so determine, with the preferred stockholders' committee the written approval and acceptance of this plan in the form designated by the preferred stockholders' committee, and by making such deposit or filing such approval and acceptance will authorize the preferred stockholders' committee on their behalf to approve the plan, to accept the plan in

Exhibit A-1—(Continued)

writing and file such acceptance in the reorganization proceedings, and to consummate the plan either in the reorganization proceedings or otherwise, as herein provided.

Holders of preferred stock may approve and accept the plan in the reorganization proceedings by such other method as may be specified by the judge.

D. Holders of certificates of deposit heretofore issued under the preferred stockholders' agreement: All depositors of preferred stock under the preferred stockholders' agreement who shall not file notice of dissent to the plan and who shall not withdraw from the preferred stockholders' agreement, as provided in said agreement and within the time therein provided, shall thereby assent to the plan and shall authorize the preferred stockholders' committee on their behalf to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to consummate the plan either in the reorganization proceedings or otherwise, as herein provided.

The preferred stockholders' committee has adopted and approved this plan and has caused or will cause a copy of the plan to be lodged with the depositary, and notice is to be given, in the manner provided in Articles Third and Ninth of the preferred stockholders' agreement. The adoption of this plan by the preferred stockholders' committee shall constitute an amendment of the preferred stockholders' agreement expressly authorizing said committee, on behalf of all holders of certificates of

Exhibit A-1—(Continued)

deposit heretofore issued who shall not file notice of dissent and who shall not exercise their right of withdrawal as provided in the preferred stockholders' agreement and within the time therein provided, and on behalf of all holders of certificates of deposit hereafter issued, to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to consummate the plan either in the reorganization proceedings or otherwise, as herein provided. [63]

E. Unsecured creditor: Pacific Public Service Company, as the only unsecured creditor of the debtor affected by the plan, may accept the plan in writing and file such acceptance in the reorganization proceedings, or such acceptance may be contained in a reorganization agreement between the bondholders' committee, the preferred stockholders' committee and said Pacific Public Service Company providing for the consummation of this plan, and the filing of a signed copy of such reorganization agreement in the reorganization proceedings shall constitute the filing of the acceptance of the plan by said Pacific Public Service Company.

If carried into effect in the reorganization proceedings, the plan, upon confirmation by the court, shall be binding upon all bondholders and all preferred stockholders and all other creditors and stockholders of the debtor, including those who have not, as well as those who have, accepted it.

If the plan shall not be carried into effect in the reorganization proceedings, the bondholders' com-

Exhibit A-1—(Continued)

mittee may determine the time, and may extend or limit the time, within which the bondholders may deposit under or otherwise assent to the plan, may impose restrictions in respect of any such deposits or assents and may in its discretion, either generally or in particular instances, permit bondholders to become assenting parties to the plan and the bondholders' agreement without the deposit of their bonds or any appurtenant coupons, under such terms and conditions, either generally or in particular instances, as the bondholders' committee in its discretion may impose.

VIII.

EXECUTION OF THE PLAN

The plan has been prepared in contemplation of its being consummated in the reorganization proceedings. If, however, the court shall fail to confirm the plan and shall dismiss the reorganization proceedings, or if for any other reason it shall in the judgment of the bondholders' committee become necessary or desirable that the plan be consummated otherwise than in the reorganization proceedings, then the plan shall be consummated in such manner as to accomplish, in the judgment of the bondholders' committee, substantially similar results for the bondholders participating in the plan, independently of the reorganization proceedings. In such case the bondholders' committee, in order that the new corporation may acquire the properties, may apply towards the payment of the sum

Exhibit A-1—(Continued)

required to be paid in cash at the foreclosure or other sale, money to be paid to the new corporation pursuant to this plan and/or the proceeds of any loan procured by the new corporation, which loan, at the option of the new corporation, may be secured by a mortgage, trust deed or other encumbrance on the properties, superior to the new trust indenture.

Subject, in the reorganization proceedings, to the approval of the judge, the bondholders' committee and the preferred stockholders' committee shall act jointly as a reorganization committee for the purpose of consummating the plan and shall have all of the authority, powers and rights vested in them pursuant to the bondholders' agreement and the preferred stockholders' agreement respectively (except and to the extent that, in the reorganization proceedings, any such authority, powers or rights may be inconsistent with Section 77B). The plan may be executed by any one or more of the means authorized or permitted by Section 77B, whether or not such means are expressly mentioned in the plan; or if the plan shall not be consummated in the reorganization proceedings, by such means as the bondholders' committee in its discretion shall determine. Without limiting the generality of the foregoing, the plan shall be executed in the reorganization proceedings at such time after its confirmation as the judge shall prescribe, and otherwise at such time as shall be specified by the bondholders committee, by the organization of the new cor-

Exhibit A-1—(Continued)

poration, the sale at a fair upset price, or the conveyance and transfer without a sale, to the new corporation of the properties, free and clear of all claims of the debtor, its stockholders and creditors (except creditors not affected by the plan), the execution by the new corporation of the new trust indenture, the issue and delivery of the new bonds and new stock; the issue by the voting trustees of participating certificates as herein provided; the payment in cash of the costs of administration and allowances as provided in Article VI hereof; the execution of such other instruments and delivery of such other securities and the performance of such other acts as the judge, or the respective committees (if in the reorganization proceedings, with the approval of the judge) shall deem necessary or proper for the purpose of consummating the plan. Subject, in the reorganization proceedings, to the approval of the judge: the respective committees shall have full power and authority to prepare, approve, execute or deliver any and all instruments of whatsoever character in their opinion necessary or proper for the purposes of the plan; the form and terms of all certificates or articles of incorporation, bonds, stock certificates, voting trust agreements, participating certificates, fractional certificates and agreements providing for their issue and all other instruments and agreements necessary or proper to consummate the plan shall be such as the bondholders' committee shall determine; the respective committees shall have the authorities and powers

Exhibit A-1—(Continued)

expressly conferred upon them under the provisions of the plan and the bondholders' agreement and the preferred [64] stockholders' agreement respectively, and also such incidental powers deemed by them necessary and proper to enable them to carry out the purposes of the plan and said respective agreements.

If the plan is consummated in the reorganization proceedings, changes and modifications therein may be made in the manner provided in subdivision (f) of Section 77B; if the plan is consummated otherwise than in the reorganization proceedings, it may be amended or modified in the manner provided in the bondholders' and preferred stockholders' agreements respectively. If in the reorganization proceedings any change or modification shall be made in the plan in the manner provided in subdivision (f) of Section 77B which in the opinion of either committee materially affects the rights of its depositors, then its depositors may be given the right to dissent and to withdraw in the manner provided in its agreement.

As its voluntary act and not pursuant to any order of court in the reorganization proceedings, the debtor shall transfer and convey, by way of quitclaim, to the new corporation all of its properties, both real and personal, tangible and intangible, and each holder of the old bonds shall, as a condition precedent to obtaining the new securities, assign and transfer his old bonds to the trustee under the new trust indenture, to be held as security for the

Exhibit A-1—(Continued)

new bonds. Notwithstanding that Section 77B or any part thereof may be finally held unconstitutional or invalid, and such holding may invalidate any order or decree confirming the plan or any part thereof, or any other order or decree in the reorganization proceedings, or the plan or any part thereof, or any act done or document executed in connection with the plan, nevertheless such transfer and conveyance of the debtor's properties to the new corporation, and such assignment and transfer of the old bonds to the trustee under the new trust indenture, and the execution and delivery of the new trust indenture and the new bonds, and the issuance of the new stock, and the execution of the voting trust agreement and the issuance of the participating certificates thereunder, shall each and all be deemed to be valid and effective acts and documents for all purposes; and it is hereby declared to be the intent and purpose of all parties hereto and of all persons participating in the plan that all such acts and documents as would otherwise be affected by any such holding, shall have the same force and effect as though done and executed outside and independently of the reorganization proceeding.

Article IX.

INDEMNITIES AND ASSUMPTIONS
OF OBLIGATIONS

The new corporation shall agree to indemnify the reorganization trustee, the trustee under the present indenture, the bondholders' committee and the pre-

Exhibit A-1—(Continued)

ferred stockholders' committee against all loss, cost, liability and expense, including, without limiting the generality of the foregoing, all income and other tax liability arising out of the operation of the properties or the deposit of the present bonds and the preferred stock, or the plan of reorganization, or any transaction required or authorized by this plan or by the judge in connection with this plan. The new corporation shall assume and agree to pay and perform all contracts and obligations of the receiver and of the reorganization trustee in connection with the improvement, management and operation of the properties which shall remain unpaid or unperformed and likewise all contracts and obligations of the debtor to its subsidiaries and affiliated companies. The new corporation shall also enter into any and all agreements with the debtor, the trustee under the present indenture, the reorganization trustee, the bondholders' committee and the preferred stockholders' committee, or any of them, which the judge shall find necessary or proper in connection with consummating this plan of reorganization.

Anything contained in any provision of the plan to the contrary notwithstanding, the new corporation may use any of its funds for the purpose of discharging its obligations on the indemnities and other agreements provided for in this Article IX.

The acceptance of any of the new bonds, the new stock or participating certificates therefor, or any other new securities pursuant to the plan shall

Exhibit A-1—(Continued)

estop such acceptor from questioning the conformity of such securities in any particular to any provision of the plan and shall constitute full ratification by such acceptor of all acts and proceedings of the bondholders' committee, the preferred stockholders' committee, the reorganization trustee, the new corporation and the trustee under the present indenture in consummating the plan. The receipt by holders of certificates of deposit representing a majority in amount of the present bonds and the receipt by holders of certificates of deposit representing a majority in amount of the preferred stock, of new securities under any of the provisions of the plan shall constitute a release and discharge of the bondholders' committee and the preferred stockholders' committee respectively, and the reorganization trustee, the new corporation and the present trustee, on the part of all holders of the present bonds and preferred stock, respectively, from all liability and accountability of every kind, character and description whatsoever, save the obligation of the new corporation to make delivery of the new securities to the holders of the present bonds and preferred stock in accordance with the plan, upon presentation and surrender of the present bonds (with all appurtenant coupons) and the preferred stock, respectively. [65]

In order to evidence the adoption of the foregoing plan of reorganization by the bondholders' committee and the preferred stockholders' committee respectively, each of said committee has caused

Exhibit A-1—(Continued)

said plan to be executed by at least a majority of its members.

Dated March 1, 1935.

CALIFORNIA CONSUMERS
COMPANY BONDHOLDERS'
PROTECTIVE COMMITTEE

By W. D. COURTRIGHT

(W. D. Courtright)

EDWARD L. EYRE

(Edward L. Eyre)

JOHN EARLE JARDINE

(John Earle Jardine)

FLOYD C. MERRITT

(Floyd C. Merritt)

GUY WITTER

(Guy Witter)

CALIFORNIA CONSUMERS
COMPANY PREFERRED
STOCKHOLDERS' COM-
MITTEE,

By GARRETTSON DULIN

(Garrettson Dulin)

WYATT H. ALLEN

(Wyatt H. Allen)

JOHN BULLARD

(John Bullard)

HERBERT E. HALL

(Herbert E. Hall)

CATESBY C. THOM

(Catesby C. Thom)

Before the Tax Court of the United States

Docket No. 2159

PACIFIC PUBLIC SERVICE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Court Room No. 401, Civic Auditorium,
San Francisco, California.

November 26, 1943, 11:25 A. M.

(Met pursuant to notice.)

Before: HON. C. R. ARUNDELL, Judge.

Appearances:

Granville S. Borden, Esq., Sigvald Nielson, and
Scott C. Lambert, appearing for Pacific Public
Service Company, Petitioner, 225 Bush Street, San
Francisco, California.

Harold D. Thomas, Esq., appearing for Commis-
sioner of Internal Revenue, the Respondent, Sharon
Building, San Francisco, California. [68]

PROCEEDINGS

The Clerk: Docket No. 2159, Pacific Public Serv-
ice Company.

Mr. Thomas: Ready.

Mr. Lambert: Ready. The appearances are Gran-
ville S. Borden and Scott C. Lambert for the Peti-
tioner.

Mr. Thomas: Harold D. Thomas for the Respondent. The Respondent at this time offers a motion to amend the Answer, accompanied by an amendment to the Answer. Petitioner's counsel has been served with a copy of the proposed amendment and I believe has no objection.

The Court: It will be allowed.

Mr. Lambert: With leave of the court, the Petitioner would like leave to file an amendment to its Petition. It involves a minor capital stock tax adjustment in which we charge error to the Commissioner, and Respondent has admitted the error and admits the facts. With leave of the Court, we would like to file the Petition.

The Court: I suppose the Petition should come in just ahead of the answer.

Mr. Lambert: That was a previous amendment to the Answer, your Honor.

The Court: Then what about this point? Do you admit the amended—

Mr. Thomas: We have an Answer to that amendment [70] already, your Honor, and I will file it at this time.

The Court: It will be received.

Mr. Thomas: It is an admission that the Respondent erred.

STATEMENT ON BEHALF OF PETITIONER

Mr. Lambert: May it please the Court, this dispute arises out of a sale by the Petitioner in the year 1940 of certain stock and bonds in the California Consumers Corporation. The Petitioner

claims a refund due to the loss on this sale and the Respondent denies the refund and has attempted to assess a deficiency based on an adjustment to the basis of the Petitioner.

The issue involves the basis of the Petitioner for the stock and bonds sold in 1940. This basis question goes back and the real issue in this controversy is the nature of a reorganization exchange which took place in 1935 by which the California Consumer Corporation merged through bankruptcy proceeding involving the California Consumers Company, and with the Court's indulgence, I think it would aid in the presentation of the case to simply and very briefly review the facts of this entire controversy.

Petitioner in 1928 acquired in exchange for shares of its own stock the common stock, all the outstanding shares, of the California Consumers Company, an ice and cold storage company doing business in Southern California through a number [71] of subsidiaries. During the years 1928 to 1933 the Petitioner also acquired \$75,000 in principal amounts of First Mortgage Gold Bonds of the California Consumers Company. During the same period Petitioner acquired 902 shares of the preferred stock of the California Consumers Company. The purchase price of the bonds and the stock is not in dispute. Petitioner paid some \$54,000 for the bonds and some \$51,000 for the stock.

During the same period Petitioner made cash advances to the California Consumers Company totaling \$478,000. In May of 1933 these advances were represented by a 5 per cent promissory note pay-

able on demand, executed by the California Consumers Company.

In October of 1933 the California Consumers Company defaulted in the semi-annual interest obligation due on its First Mortgage Bonds, and the trustee under the mortgage, the First National Bank of Los Angeles, petitioned the Federal District Court for the appointment of a temporary receiver and a foreclosure upon these bonds. A temporary receiver was appointed and took over the properties of the California Consumer Company. The year 1933 and the commencement of the bankruptcy proceedings of the California Consumers Company is the first date of importance.

During the years from October, 1933, until March 1, 1935, the bondholders formed a protective committee, and the preferred shareholders formed a protective committee, and jointly [72] these two committees, with the Petitioner as unsecured creditor, proposed a plan of reorganization to the Federal Court which was accepted and approved September 30, 1935.

It is this reorganization plan and exchange which is in dispute here, your Honor. Under that exchange the bondholders received bonds in the same amount, the same principal amount, of the new corporation formed, and the preferred shareholders and the unsecured creditor, the Petitioner here, received stock in the new corporation. The new corporation issued \$3,496,500 worth of First Mortgage Bonds to replace the old bonds. They issued 54,000 shares of stock, which was divided between the preferred

shareholders, who received 42 per cent, and the Petitioner, who received 6 per cent, representing its unsecured claim on the note.

The Petitioner claims the 1935 transaction to have been one from which no gain or loss is recognized under two sections of the Internal Revenue Code, the 1934 Code at that time. The Respondent denies the tax-free character of that exchange and finds that Petitioner acquired a new basis under that exchange for its bonds and stock in the new company. Petitioner claims the reorganization exchange to have been tax free under two sections of the law; first, it was a reorganization within Section 112 (g) (1) (b) of the Revenue Act of 1934, which provides that a reorganization includes the acquisition by one corporation solely in exchange for its voting stock of substantially all the properties of another [73] corporation.

The Court: Say that again?

Mr. Lambert: This Section 112 (g) (1) (b) provides that a reorganization includes the acquisition by a corporation solely in exchange for its voting stock of substantially all the properties of another corporation.

The Court: Well, is that true here?

Mr. Lambert: Yes. That is true. In 1939, your Honor will remember the Hendler legislation amended this section to add that in determining whether an exchange is solely for voting stock an assumption of a liability by the transferee corporation shall be disregarded. We contend that this exchange comes exactly within that Section of the

1934 Act, as amended by the 1939 Act, in that the new corporation issued its voting stock and assumed the old bonds of the old corporation by issuing its new bonds, and it is an exchange solely for voting stock plus an assumption of liabilities. The case of Harden F. Taylor, 43 BTA, which was affirmed in the Second Circuit, 128 Fed. 2, held that in determining whether or not an exchange is solely for voting stock the issuance of new bonds in substitution for old bonds which were in default shall be deemed to be an assumption of the old bonds for the purpose of applying this section.

The Petitioner also claims——

The Court: Well, there is a sort of lack of continuity [74] in that transaction, isn't there? Were the old stockholders wiped out?

Mr. Lambert: The old common shareholder was wiped out. That was the Petitioner. The Petitioner owned all the common shares of the old corporation and their interests were evaporated in the reorganization exchange. Under the Supreme Court's language in the Alabama Asphalt Limestone Case your Honor will recall that they said in the reorganization bankruptcy proceedings under 77 (b) the creditors or bondholders take effective ownership of the old corporation and freeze out the common shareholders, and the Petitioner lost its interest as a common shareholder in the new corporation. It had a basis of \$1,500,000 for which no claim is made. Petitioner's claim is based upon its proprietary interest as bondholder, preferred shareholder, and unsecured creditor, in

exchange for which it received bonds and stock of the new corporation.

Petitioner also claims, your Honor,—

The Court: Well, your point is that the new California Consumers, whatever it is called, acquires the property of the old California Consumers under this provision of the Revenue Act 112 (g) (1) (b)?

Mr. Lambert: Yes.

The Court: And that no gain or loss would be recognized, even though there is not a continuity between the old stockholders and the new holders?

Mr. Lambert: There is no continuity, your Honor, [75] between the old common shareholders of the old corporation and the shareholders of the new. The common shareholders lost their interest when the reorganization bankruptcy proceedings were instituted. The corporation was insolvent.

The Court: Well, what application is there of the Hendler principle in here?

Mr. Lambert: Well, that simply under the Hendler legislation in 1939 the assumption of liabilities was not removed from the reorganization tax-free character.

The Court: In other words, it is not treated as other property?

Mr. Lambert: That is right. It is an assumption of liability. It is not money or other property paid to the transferrors.

The Court: Go ahead. These are rather difficult to follow.

Mr. Lambert: I hope you will feel free in asking questions, your Honor.

The Petitioner also contends that the exchange comes clearly within Section 112 (b) (5) of the Revenue Act of 1934, which provides that no gain or loss shall be recognized if one or more persons transfer property to a new corporation and immediately after the exchange they are in control of said corporation. Where the exchange is made by two or more persons, in determining whether the exchange is exempt, [76] the interests both before and after the exchange must be in proportion.

The Court: Well, how does that come in here?

Mr. Lambert: The parties in this case were the bondholders and the preferred shareholders and the unsecured creditor, who transferred their interests in the old corporation to a new corporation in exchange for stock and securities in the new corporation, and under the Cement Investors case in the Supreme Court, this transaction comes right within the effect of that case, which held that such a case comes within 112 (b) (5) of the Revenue Act of 1934 as a transfer by two or more persons who remain in control of the corporation after the exchange.

The Court: Just what are the mechanics in this case? There is a new corporation organized and do the bondholders of the old corporation transfer their interests or stock in the new corporation?

Mr. Lambert: Yes.

The Court: And then the new corporation thereafter, in a separate transaction or as some part of the same transaction, acquires the assets of the old company?

Mr. Lambert: Well, the assets of the old corporation, of course, were transferred by the receiver.

The Court: For what?

Mr. Lambert: To the new corporation in consideration [77] of the issuance by the new corporation of its stock to the parties in interest, the bondholders and the persons who had a proprietary interest in the new corporation.

The Court: And I presume that they assumed some of the bonded indebtedness or what?

Mr. Lambert: The new corporation assumed the old bonded indebtedness of the old corporation, it is our contention.

The Court: It seems to me what you state are two different transactions.

Mr. Lambert: There are two separate sections of the law, of course.

The Court: I know there are two sections of the law, but you are stating two separate transactions, aren't you?

Mr. Lambert: Well, within the reorganization section it comes because the new corporation has received property of an old corporation which is in bankruptcy, and it receives that and issues therefor both voting stock and assumes liability. It comes under 112 (b) (5) because the persons who owned a proprietary interest in the old cor-

poration, the bondholders, the creditors, and the preferred shareholders, transfer their interests under the reorganization exchange to the new corporation solely for its stock and they remain in control thereafter. [78]

Your Honor will recall that under the Alabama Asphalt and Limestone Case and its companion cases that in 77 (b) reorganizations the parties in interest are the creditors who are foreclosed and they are in control of the old corporation and their interests are transferred to the new corporation in exchange for its stock and securities and the exchanges are tax free.

The Court: Didn't the Court make some distinction between cases where these transactions occurred before a certain date and where they occurred after a certain date?

Mr. Lambert: You mean in those cases? Yes, your Honor in the——

The Court: I have forgotten what that was.

Mr. Lambert: In the Alabama case the exchange took place under the 1928 Act, and in that case there was no need for the exchange solely to be in consideration of voting stock. The Southwest Consolidated case came along under the new Act which had become more strict in the definition of what had to be issued by the new corporation, and it was found that it had to be solely voting stock. In the Southwest case cash was issued and paid to certain parties and the transaction was not exempt because it was not solely for voting stock.

The Court: How does that fit in here?

Mr. Lambert: No consideration was paid by the new corporation except its voting stock and new bonds which constituted [79] an assumption of the old bonds. No cash was paid to any party, no consideration other than the new stock and bonds, and that came within the Cement Investors case because in a similar transaction they held that 112 (b) (5) was applicable because the persons who had the proprietary interest in the old corporation transferred their interest to the new corporation solely in exchange for its stock and securities, and remained in control, provided that their interests are proportionately both before and after the exchange.

That is the issue between the Petitioner and the Respondent on this exchange under 112 (b) (5), and we have brought today the party who had the leading influence in the reorganization proceedings and we would like to offer his testimony later. He saw this from the beginning right through as head of the preferred shareholders committee, right through the culmination of the reorganization plan, and his testimony the petitioner offers on the question of the issue of the proportionate interest of the parties before and after the exchange.

The Court: How do you figure that, that they would have the same proportionate interest? Do you forget those advances?

Mr. Lambert: No, sir. The advances for which the Petitioner held its note were surrendered under the plan of reorganization and the Petitioner received 6 per cent of the new [80] stock. The bond-

holders, of whom Petitioner was one, surrendered their bonds and received new bonds in like principal amount, and the preferred shareholders surrendered their interest in exchange for new stock.

The Court: Share for share?

Mr. Lambert: No, sir. The stock issued by the new corporation was in excess of the shares issued by the old. There were 15,000 shares of the old corporation preferred stock, and the new corporation issued 54,000.

The Court: That money that was advanced disappears pretty much, doesn't it, in the reorganization?

Mr. Lambert: Well, Petitioner stood as a creditor——

The Court: And he ends up as a——

Mr. Lambert: As a preferred shareholder—I mean, as a shareholder.

The Court: As a common stockholder?

Mr. Lambert: Yes, sir.

The Court: Wouldn't that change the interests before and after?

Mr. Lambert: No, we contend that the value of the interest of petitioner and the other parties prior to the exchange was exactly the same as after although it was in a different form. The interest immediately prior to the exchange—the statute imposes that restriction—in other words, immediately prior to this exchange petitioner held an [81] interest in the new corporation, a proprietary interest, by virtue of its note. The value of that interest was appraised and determined by the parties.

They determined that petitioner was entitled by virtue of that to a 6 per cent interest in the new corporation, and that is what they received.

The Court: You mean that the 6 per cent would be the equivalent of \$478,000?

Mr. Lambert: Well, in value we contend that it was the equivalent.

The Court: Monetary value?

Mr. Lambert: I won't say, your Honor, that the new stock was worth \$478,000. I don't mean that. I mean the petitioner had an interest there in the new corporation which immediately prior to the exchange had a value commensurate with the value of the property which it received in the exchange. There were readjustments of interest.

The Court: If that is what that statute means, I just don't know but I assume that the moment it was decided that what you were going to get is 6 per cent of the common, the claim could never be worth more than that because that is all you could get.

Mr. Lambert: That is true.

The Court: But that helps to destroy this continuity that is always true in these reorganization cases to see whether the same interest prevails. [82]

Mr. Lambert: The continuity of interest is present here, your Honor, under the Supreme Court's definition of it in these reorganization cases. In those four cases they found the continuity of interest to be present where the creditors and the parties held proprietary interests in the old corporation which continued by virtue of

stock or new bonds in the new corporation, they need not be the same, but they remain in control. We contend that in the reorganization negotiations between the parties they appraised the interests of the various creditors, the bondholders, and the preferred shareholders and they allocated to each an interest in the new corporation which they were entitled to, and Petitioner had a basis for his new stock based on this note which it held and which it exchanged for new stock because of the tax free character of the transaction.

That is all we have.

STATEMENT ON BEHALF OF RESPONDENT

Mr. Thomas: If your Honor please, Respondent contends there was not a reorganization here in 1935 under Section 112 (g) of the 1934 Act. In this case bonds were issued in addition to stock which would entirely take it without the provisions of 112 (g) (1) (b).

We further take the position that even if there can be said to be a reorganization under 112 (g), there are no provisions of Section 112 which would preclude the recognition [83] of gain or loss at that time.

The Court: Why do you say it does not come under 112 (g) (1) (b)?

Mr. Thomas: We say that bonds were issued as well as stock. In other words, Respondent takes the position that the bonds of the old company, the liability of the old company on its bonds were not assumed by the new company. The plan speci-

fically provides that that liability is not assumed, and I might state that the provisions of the bonds of the old corporation and the bonds of the new corporation are substantially different. The old bonds were straight first mortgage 6 per cent bonds, maturing in 20 years; the new bonds were income bonds to the extent of 2 per cent of the 5 per cent interest which they bore.

The Court: What does that mean? There was only a requirement to pay 3 per cent certain?

Mr. Thomas: I believe that is the provision. It is contained in Article 4 of the plan, which will be offered in evidence, that the new bonds shall bear interest at the rate of 5 per cent per annum, the first payment of interest to be due 8 months after the date of the new bonds; of said interest at the rate of 5 per cent per annum, interest at the rate of 3 per cent per annum shall be fixed, that is, unconditionally due, and the balance of the annual interest shall be payable in annual installments but only if and to the extent [84] that the net income of the new corporation and its subsidiaries on a consolidated basis is available for the payment of interest.

The Court: Is the face amount the same?

Mr. Thomas: Yes, the face amount of the new bonds is the same.

Now, Respondent further takes the position that even if it be considered that the former holders of interests in the California Consumers Company, that is, the old company—even it be considered that they acquired equitable interests in the property

which was transferred to the new corporation, we claim that there is an anterior loss even if Section 112 (b) (5) of the Act were held otherwise applicable. In other words, if you take the exact interests which were held by the various parties in the old corporation and compare them with what they got in the new there is not the proportional interest retained as required by Section 112 (b) (5).

The Court: Why do you say that? Explain that.

Mr. Thomas: Well, because the unsecured creditor, which ranks the preferred stock, received a much less representation in the new corporation than the preferred shareholder. Mr. Lambert mentions the Cement Investors case where, I believe, the Supreme Court considered that the bondholders of the old corporation had in effect acquired equitable interests in the property. However, in that case the [85] bondholders were the only one that were represented in the reorganization, that, is they were the only ones that got anything in the new corporation. Here we have, of course, other interests, so as to whether you can compare this to Cement Investors in that respect is subject to doubt.

I might mention that here also there was a dividend suit against the Petitioner as—you might say, the Petitioner as director or controlling the old company, and the plan called for a dismissal of this dividend suit, so that I believe we will have to take into consideration the fact that that dividend suit against the petitioner was dismissed as a re-

sult of the plan. In other words, that is one of the considerations of the plan.

The Court: For a moment I have forgotten exactly what the point is that we want to determine. I mean, once we determine this reorganization question, then what is the immediate point?

Mr. Thomas: The ultimate point to decide is, I believe, that unless it be determined that the transaction in 1935 does not affect the cost of the original interests in the old corporation, then the Respondent's determination will simply have to be approved.

The Court: Have these shares been sold?

Mr. Thomas: They were sold in 1940. That is, all of the shares of preferred stock and bonds carrying with them [86] the right to participate and vote common stock, all of that was sold, all of the interest which petitioner got in 1935 in California Consumers Corporation was sold in 1940.

The Court: And they want the original cost basis?

Mr. Thomas: That is correct, your Honor, including the basis of approximately \$478,000 which was the amount of that note.

The Court: But if this transaction we have been talking about is a taxable one, then the petitioner agrees that the determination is correct?

Mr. Thomas: I believe so.

Mr. Borden: May I answer that? If there was not a tax free exchange in 1935, then the basis, of course, of the stock which was sold in 1940 would be the fair market value of the interest turned in

at that time. The agent has determined that amount to be a relatively small amount and has allowed us a loss for the year 1940. So, I think the answer to your inquiry is in the affirmative, that the determination of the Respondent would be held to be correct if it is held that there was a taxable exchange; and the resulting large, tremendous loss to the petitioner in the year 1935—in 1940 when it was sold, is the reason for the refund claim. The refund only amounts to \$30,000 because \$30,000 is all the amount that the taxpayer, Pacific Public Service Company, paid for the year 1940. That large interest in the other subsidiary [87] as a result of the consolidation in 1935 results in a deduction of only \$35,000. So, in the whole picture of the case, the taxpayer, a company earning close to \$1,000,000, will only have a deduction benefit for any year if it wins in this case in an amount equal to \$30,000.

Mr. Thomas: I have nothing further to state.

Mr. Lambert: Your Honor, the parties have entered into a stipulation of facts which we should like to submit. This stipulation contains all of the facts, I believe, necessary to the determination of the question of whether or not this be a transaction within 112 (g) (1) (b) as a reorganization; on the other question, on the proportionate interest issue, as I stated, we have testimony to offer, but all the facts necessary for the other issue are within this stipulation which we should like to offer.

Mr. Thomas: I don't exactly agree that quite

all the facts are there. I wish to offer a document or two in evidence.

The Court: We will receive the facts as stipulated. Now, Mr. Thomas, do you want to put in your evidence before the petitioner completes his case?

Mr. Thomas: No.

The Court: I thought you had some exhibits.

Mr. Thomas: It is part of Respondent's case, your Honor. I will wait for my regular time. [88]

Mr. Lambert: Mr. Hall is extremely rushed to-day and I would like to accommodate him by calling him at this time.

HERBERT E. HALL

a witness called on behalf of the petitioner, was duly sworn and testified as follows:

Direct Examination

By Mr. Lambert:

Q. Your name is? A. Herbert E. Hall.

Q. You are a resident of San Francisco?

A. I reside across the Bay, and am practicing law in San Francisco.

Q. Your occupation is attorney?

A. Yes.

Q. Mr. Hall, are you familiar with the transaction which took place between the petitioner here and the bondholders and the California Consumers Company which culminated in the organ-

(Testimony of Herbert E. Hall.)

ization of the new California Consumers Corporation in 1935? A. I am.

Mr. Lambert: If the Court please, I think it might facilitate your understanding of this if Mr. Hall just told his story as he recalls the facts. He was the——

By Mr. Lambert: [89]

Q. If you will indicate your part in the proceedings and just tell everything as you recall it——

Mr. Thomas: If your Honor please, I am going to object to the testimony. I believe it is entirely immaterial. We have here a stipulation of facts as to the entire plan and as to what took place and what was done. I believe any testimony as to what took place would be immaterial.

The Court: I don't presume counsel is going to vary the terms of the stipulation of facts by his testimony.

Mr. Thomas: I make the objection.

The Court: It will be overruled.

Mr. Thomas: Note an exception.

The Court: Note the exception.

A. In 1928 I purchased 100 shares of the preferred stock of California Consumers Company. In 1933 the bonds of that company went in default. As I recall, along about February of 1924 a committee of the bondholders——

The Court: 1934?

The Witness: 1934. The bonds, as I recall, went into default in 1933.

A. (Continuing): ——Early in 1934 a bond-

(Testimony of Herbert E. Hall.)

holders' protective committee was formed. As soon as the preferred stockholders heard of the formation of that committee, they thought it advisable that they form a committee, which they did, and I was appointed one of the members of that committee. Other [90] members were Mr. Dulin, of Los Angeles, Mr. Bullard of Los Angeles, Mr. Thom, of Los Angeles, and Mr. Wyatt Allen of San Francisco.

Shortly after the formation of that committee a meeting of it was held in Los Angeles, together with certain members of the bondholders committee. The bondholders committee told us that they would not recognize us in any transactions that they had with regard to the foreclosure of the bonds or the reorganization of the company unless the claim of the Pacific Public Service in the amount of approximately \$480,000 could be gotten out of the way, their position being that that claim was superior to the rights of the preferred stockholders, and until we were in a position to show that we were at least on a parity with or superior to the claim of Pacific Public Service we had no standing.

I was then delegated by the committee to negotiate with Pacific Public Service Company to see what could be done with regard to its claim. I had several conferences with Mr. R. W. Hanna, of Pacific Public Service Company, and the position that I took was that Pacific Public Service should do either one of two things; one, it should waive its claim entirely in favor of the preferred stockholders, or, two, that it should assign its claim to the

(Testimony of Herbert E. Hall.)

preferred stockholders committee on some sort of a basis whereby it would get a proportion of whatever shares of the stock of the new corporation [91] were allocated to the preferred stockholders. My reason for saying I thought the Pacific Public Service ought to be taken out of the picture was that I thought that to some extent they led the preferred stockholders to believe that with their interest in the California Consumers Company that the dividends would be protected and that there would be better management and all that, and it had been quite a blow to the preferred stockholders to find everything had dropped from under them.

He said that the company would not consider a complete waiver of the claim. He thought it was a justified claim and could be well supported by evidence.

As to the second point, he said that he thought that the company would be amenable to such a plan but he would have to take it up with his directors and would advise me. He had a meeting and advised me that they would consider a proposition of that sort and asked me what I thought would be the maximum amount that would be allocated to Pacific Public Service out of whatever we got. I said, not over 25 per cent. He agreed to that and the whole transaction was put in writing in the form of a letter from me as a member of the committee to him, and approved by him on behalf of Pacific Public Service Company.

Later, after further negotiation with the bond-

(Testimony of Herbert E. Hall.)

holders committee in determining to what extent the preferred stock holders were going to be scaled down on the reorganization, [92] I went back to him again and told him that we thought his interest should be cut down to $12\frac{1}{2}$ per cent, or one-half of the original amount. To that he agreed and that was put in the form of a letter.

The plan finally went through pretty well as has been outlined to you. The bondholders received par for par for their old bonds, 5 per cent bonds, 3 per cent of the interest being certain and 2 per cent on an income basis. They also received 51 per cent of all of the new capital stock of the company. Originally there was something like 15,900 shares of preferred and about 20,000 of common. All that went out and there was merely one class of capital stock, as I recall, approximately 54,000 shares. Of those 54,000 the bondholders got 52 per cent, the preferred stockholders got 42 per cent, and Pacific Public Service got 6 per cent.

I then proceeded as a member of the committee to work with the bondholders committee on the drafting of the plan of reorganization and of the trust indenture, but, as far as I was concerned, that was the last contact that I had with Pacific Public Service other than to get their approval finally to the plan or reorganization.

I think that is about all.

By Mr. Lambert:

Q. Mr. Hall, may I ask one or two questions? These three groups you have described, these bond-

(Testimony of Herbert E. Hall.)

holders, yourself [93] and the other preferred shareholders, and Pacific, would you say they were strangers or friendly in a business sense?

A. I would say they were definitely strangers. There were conflicting interests all the way through the transaction. They were certainly dealing at arm's length. There was no time we all got together and said, "Boys, here is the plan." You had to fight for every point in connection with the reorganization.

Q. In other words, your negotiations were definitely on an arm's length basis where each was seeking to protect his own interest?

A. That is right, and get the most out of it that he could, no question about that.

Q. As a result of these negotiations, would you say that the relative interests in the new corporation were determined to be measured by the relative rights of the old corporation?

Mr. Thomas: That is objected to, your Honor. It calls for a pure conclusion on the part of this witness.

The Court: I think I am going to sustain that objection.

Mr. Lambert: That is all I have, Mr. Hall.

Cross-Examination

By Mr. Thomas:

Q. Mr. Hall, were you an officer or director of the [94] old company, the California Consumers Company?

A. No, I was not.

(Testimony of Herbert E. Hall.)

Q. Were you at the time of this bankruptcy and the transaction in question an officer or director of Pacific Public Service Company?

A. No, I was not.

Q. Were you ever an officer or director of California Consumers Corporation? A. No.

Q. Mr. Hall, in connection with your negotiations, and particularly with Pacific Service Company, was the question of the dividends suit against that company and others ever discussed?

A. It was, to this extent, that in negotiating this matter with Mr. Hanna I pointed out to him that there was a suit against Pacific Public Service which would have to be eliminated before there could be any reorganization.

Q. You knew, did you not, that that suit charged the Pacific Public Service Company, as controller or director of the California Consumers Company, with having paid dividends on common stock and preferred stock out of capital? A. I did.

Q. That is, in years prior to 1933?

A. That is right.

Mr. Thomas: That is all. [95]

Mr. Lambert: That is all, Mr. Hall.

The Court: Step down.

(Witness excused.)

Mr. Lambert: Your Honor, we should like to ask the Respondent to stipulate that this is a true copy of the claim for refund of the \$30,000 paid by petitioner and the grounds of this claim are as stated therein.

Mr. Thomas: (After examining): I have no objection.

The Court: It will be received.

The Clerk: Petitioner's Exhibit No. 1.

(Copy of claim for refund was received in evidence and marked Petitioner's Exhibit No. 1.)

Mr. Lambert: These are the plans of reorganization which are attached to the stipulation as Exhibit 1-A.

Mr. Thomas: I don't believe they have been marked as Exhibit 1-A, Mr. Lambert.

Mr. Lambert: I don't think they have.

(Plans of reorganization were received in evidence and marked Petitioner's Exhibit 1-A.)

Mr. Thomas: Respondent offers at this time a copy of the complaint filed in the Superior Court of the State of California by Guy L. Goodman, as temporary receiver, and others, against Pacific Public Service Company and others. There is also included in this offer a copy of the order of dismissal to the action dated January 3, 1936. [96]

The Court: What is the purpose of this?

Mr. Thomas: The purpose, your Honor, is to show that the dividend suit which was mentioned in the plan or reorganization, and which it is stated as a result of the plan shall be dismissed, was a suit against the Pacific Public Service Company and others for having declared dividends on the common and preferred stock of California Con-

sumers Company out of capital, in other words, having wrongfully paid out the funds.

The Court: I mean, that is the charge, but it was never adjudicated?

Mr. Thomas: It was not, no.

The Court: What is the significance of having it in this case?

Mr. Thomas: I think it shows that the dividend suit is something substantial, it just is not something that was thrown into the plan.

The Court: I mean, what will it have to do with it even if it was?

Mr. Thomas: I think it may well show why the petitioner as unsecured creditor was not proportionately represented in the securities, the stocks and bonds of the new company when issued.

The Court: I don't see how it shows that. I mean, I don't know what conclusion we can draw from it. Someone [97] makes a charge and that is as far as it goes.

Mr. Thomas: Well, I will admit it is not conclusive, your Honor, but inasmuch as——

The Court: It is not anything. I charge that you owe me a million dollars and that is the end of it. It doesn't prove you owe the million dollars.

Mr. Thomas: That is correct, your Honor, but still a suit is a suit, and whether you have admitted liability or denied it, suits are compromised, and I merely want to show that it is——

The Court: All right.

Mr. Thomas: That it is something substantial, as I claim.

Mr. Lambert: Your Honor, if you would entertain it, I should like to make an objection to the admission of that suit. In order to place it in the proper light, I will give this explanation of my objection. The suit was, as you say, simply a claim. A copy of the summons was never served on the defense. It was simply filed with the Superior Court nearly two years after the filing of the action within which suit had to be brought or it would expire under the state law. The plaintiffs approached the defense and asked them to enter a general appearance and stipulate that they could have an indefinite time within which to bring it to trial. In other words, the suit was hardly more than a frivolous [98] appeal, it was never tried, it was never even served on the defendant. The defendants entered into a stipulation that they should have an indefinite period within which to bring it to trial, but it was—I don't know the purpose of the suit—maybe it was to put them in some degree of position in the reorganization, but I should like to enter my objection to the admission of that claim.

The Court: You object on the ground that it is irrelevant?

Mr. Lambert: It is irrelevant and immaterial.

Mr. Thomas: I believe it is very relevant, your Honor. It shows the substantial nature of the action.

The Court: Well, I am going to overrule the objection.

Mr. Lambert: Your Honor, may I offer—

The Court: I don't see at the moment where

it can have one bit of bearing. In other words, it is sort of like the counsel who asks the witness if he didn't lie, and he says, "No, I didn't lie." Then you say, "Well, maybe he lied." Somebody makes a charge and they don't pursue it and I don't see how I can draw any conclusion on that.

Mr. Thomas: I think it at least explains the nature of the suit, and that is one of the considerations mentioned in the claim.

(Copy of complaint was received in evidence and marked Respondent's Exhibit A.) [99]

Mr. Lambert: Your Honor, the Petitioner would like to offer in evidence a certified copy of the stipulation which gave the plaintiffs unlimited time in which to bring it to trial.

Mr. Thomas: No objection.

The Court: Received.

The Clerk: Petitioner's Exhibit No. 2.

(Certified copy of stipulation was received in evidence and marked Petitioner's Exhibit No. 2.)

Mr. Lambert: That concludes the Petitioner's case, your Honor.

Mr. Thomas: I have nothing further.

The Court: Close the record.

(Discussion off the record.)

The Court: We will recess until 2:00 o'clock.

(Whereupon at 12:25 P.M. the case was closed.)

[Endorsed]: T.C.U.S. Filed Dec. 21, 1943. [100]

RESPONDENT'S EXHIBIT A

In the Superior Court of the State of California,
in and for the County of Los Angeles

No. 367553

GUY L. GOODWIN, as Temporary Receiver on foreclosure of mortgaged property, under Order dated December 2, 1933, In Equity, Cause No. 122-C, in the United States District Court, for the Southern District of California, Central Division, SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, as Trustee under the provisions of Trust Indenture dated as of April 2, 1928, from California Consumers Company to Los Angeles-First National Trust & Savings Bank, predecessor in interest of Security-First National Bank of Los Angeles, recorded April 27, 1928, in Book 7115, Page 83, of Official Records of the County of Los Angeles, State of California, and LUTHER S. BELL, a preferred stockholder of California Consumers Company,

Plaintiffs,

vs.

PACIFIC PUBLIC SERVICE COMPANY, a corporation, et al.,

Defendants.

DISMISSAL OF ACTION,
with prejudice.

The above entitled action is hereby dismissed as to all defendants therein named, with prejudice

Respondent's Exhibit A—(Continued)

to all of the plaintiffs therein; and the Clerk of the above entitled Court is hereby authorized and directed to enter this dismissal of record.

Los Angeles, California, January 3, 1936.

O'MELVENY, TULLER &
MYERS,

.....

(Walter K. Tuller)

.....

(Pierce Works)

.....

(Graham L. Sterling, Jr.)

In the Superior Court of the State of California,
in and for the County of Los Angeles

No. 367,553

GUY L. GOODWIN, as Temporary Receiver on foreclosure of mortgaged property, under Order dated December 2, 1933, In Equity, Cause No. 122-C, in the United States District Court, for the Southern District of California, Central Division, SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, as Trustee under the provisions of Trust Indenture dated as of April 2, 1928, from California Consumers Company to Los Angeles-First National Trust & Savings Bank, predecessor in interest of Security-First National Bank of Los Angeles, recorded April 27, 1928, in Book 7115, Page 83, of Official Records of the County

Respondent's Exhibit A—(Continued)
of Los Angeles, State of California, and LUTHER S. BELL, a preferred stockholder of California Consumers Company,

Plaintiffs,

vs.

PACIFIC PUBLIC SERVICE COMPANY, a corporation, CALIFORNIA CONSUMERS COMPANY, a corporation, JOHN A. BULLARD, JOHN A. BULLARD, as Trustee, CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, as Trustee, KATE P. CRUTCHER, EDITH W. DAVIS, MABEL S. LOUGHERY, AMELIA SEIBERT, ERIC A. STARKE, YOUNG-CLARKE & COMPANY, a corporation, SAMUEL L. ABBOTT, H. F. ALLEN ESTATE COMPANY, a corporation, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Trustee, BUSH STREET INVESTMENT CO., a corporation, INA CAMPBELL, SUSAN N. FITKIN, THE GUIBERSON CORPORATION, a corporation, HERBERT E. HALL, JEANETTE MEIER HELLER, G. D. LUCY, JAMES H. PIERCE, RED SALMON CANNING CO., a corporation, THOMAS RHODUS, SR., CLARENCE J. WETMORE, CLARENCE J. WETMORE, as Executor, ROBERT T. SHELDON, HARRIET L. SPERRY, JAMES E. WALSH, DEAN WITTER & CO., a corpora-

Respondent's Exhibit A—(Continued)

tion, JACK M. WRIGHTSON, A COMPANY, a corporation, B COMPANY, a corporation, C COMPANY, a corporation, D COMPANY, a corporation, E COMPANY, a corporation, F COMPANY, a corporation, G COMPANY, a corporation, H COMPANY, a corporation, I COMPANY, a corporation, J COMPANY, a corporation, ONE DOE, TWO DOE, THREE DOE, FOUR DOE, FIVE DOE, SIX DOE, SEVEN DOE, EIGHT DOE, NINE DOE, TEN DOE, ELEVEN DOE, TWELVE DOE, THIRTEEN DOE, FOURTEEN DOE, FIFTEEN DOE, SIXTEEN DOE, SEVENTEEN DOE, EIGHTEEN DOE, NINETEEN DOE, TWENTY DOE, TWENTY-ONE DOE, TWENTY-TWO DOE, TWENTY-THREE DOE, TWENTY-FOUR DOE, TWENTY-FIVE DOE, TWENTY-SIX DOE, TWENTY-SEVEN DOE, TWENTY-EIGHT DOE, TWENTY-NINE DOE and THIRTY DOE,

Defendants.

BAUER, MacDONALD,
SCHULTHEIS & PETTIT,

.....

(Alexander Macdonald

.....

(Fred E. Pettit, Jr.)

.....

(Robert H. Edwards, Jr.)

Attorneys for Plaintiffs.

Respondent's Exhibit A—(Continued)

COMPLAINT

(to recover upon behalf of California Consumers Company judgment account dividends unlawfully declared and paid.)

Plaintiffs and each of them complain of the defendants and each of them, and for cause of action allege that:

I.

Plaintiff Guy L. Goodwin is an individual residing within the City of Los Angeles, County of Los Angeles, State of California. By order of the United States District Court, for the Southern District of California, Central Division, dated December 2, 1933, In Equity, Cause No. 122-C, entitled "Security-First National Bank of Los Angeles, as Trustee, Plaintiff, vs. California Consumers Company, a corporation, Defendant," brought to foreclose the mortgage and trust indenture of California Consumers Company dated as of April 2, 1928, and hereafter more in detail referred to, said Guy I Goodwin was appointed Temporary Receiver on foreclosure of the mortgaged property in said mortgage and trust indenture described and referred to. On said 2nd day of December, 1933, he swore faithfully to perform his duties as such Receiver in said action, and in accordance with the

Respondent's Exhibit A—(Continued)

provisions of said order dated December 2, 1933, furnished and filed a bond in the sum of Two Hundred Thousand Dollars (\$200,000.00), conditioned upon faithful performance by him of the duties of his office as such Receiver. Since said date he has been and now is the duly qualified, appointed and acting Temporary Receiver on foreclosure of property described and referred to in said mortgage and trust indenture, to-wit, all of the property, real, personal and mixed, of every kind and nature, of the defendant California Consumers Company.

II.

By the provisions of the order dated December 2, 1933, said Guy L. Goodwin, as Temporary Receiver, is authorized and empowered, among other things, to institute, prosecute and defend, compromise, adjust, intervene in, or become a party to such suits, [104] actions, proceedings at law or in equity, including ancillary proceedings in state or federal courts, as may in the judgment of the Receiver be necessary or proper for the protection, maintenance and preservation of the property and assets of said California Consumers Company and the conduct of its business for the carrying out of the terms and provisions of said order, and in his discretion to compound and settle with all debtors of said California Consumers Company, with persons having

Respondent's Exhibit A—(Continued)

possession of its property or in any way responsible at law or in equity to said California Consumers Company, upon such terms and in such manner as said Receiver shall deem just and beneficial to said California Consumers Company and its creditors.

III.

Pursuant to the provisions of said order dated December 2nd the plaintiff Guy L. Goodwin, as such Receiver, took and entered into possession of and still has possession of all of said property, real, personal and mixed, of every kind and nature, of said California Consumers Company.

IV.

The plaintiff Security-First National Bank of Los Angeles is, and for a period of several years last past has been, a national bank organized and existing under and by virtue of compliance with the laws of the United States and duly empowered to exercise, and exercising, all of the rights and privileges of national trust and savings banks and associations under the laws of the United States.

V.

By indenture dated as of the 2nd day of April, 1928, recorded the 27th day of April, 1928, in Book 7115, page 83, of Official Records of the County of Los Angeles, on September 18, 1928, in Volume 230, page 1, of Official Records of the County of Ventura, [105] and on October 20, 1928, in Book 1550, page 1, of Deeds, Records of the County of San

Respondent's Exhibit A—(Continued)

Diego, all in the State of California, California Consumers Company, hereafter more in detail referred to, conveyed to Los Angeles-First National Trust & Savings Bank, hereafter more in detail referred to, as Trustee, all of the right, title and interest of said California Consumers Company in and to any and all premises, property, franchises and rights of every kind and description, real and personal (excepting accounts receivable, bills receivable, cash on hand and in bank, materials and supplies, commodities constituting a whole or any part of stock of merchandise kept for sale, contracts and operating agreements with other companies, leases and leasehold interests, and all shares of stock, bonds and other securities not specifically transferred or assigned to or pledged with said Los Angeles-First National Trust & Savings Bank of Los Angeles, as Trustee), then owned or thereafter acquired by said California Consumers Company, including other and after acquired property as follows, namely, also all other property, real, personal and mixed, which said California Consumers Company then owned and all which said California Consumers Company might thereafter acquire, together with all and singular the tenements, hereditaments, fixtures and appurtenances belonging or in any wise appertaining to the aforesaid property or any part thereof, with the reversion and reversions, remainder and remainders, tolls, rents, revenues, issues, income, product and profits thereof, and all of the estate, right, title, interest and claim whatso-

Respondent's Exhibit A—(Continued)

ever, at law as well as in equity, which said California Consumers Company then had or might thereafter acquire in and to the aforesaid property and franchises, and every part and parcel thereof. All of said property above referred to and in said indenture described and referred to was thereby conveyed in trust to secure the punctual payment of principal [106] and interest of and the faithful performance of the terms and conditions contained in a series of first mortgage and first lien gold bonds in an aggregate principal sum of Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000.00) to be issued, sold and delivered by said California Consumers Company, and which said bonds were thereupon and thereafter pursuant to the provisions of said indenture so issued, sold and delivered.

VI.

Said Los Angeles-First National Trust & Savings Bank was on said 2nd day of April, 1928, and for a long time thereafter, a national bank organized and existing under and by virtue of compliance with the laws of the United States. Plaintiff Security-First National Bank of Los Angeles is its successor in interest and the assignee and successor therefor under the provisions of said trust indenture and is the present Trustee under said provisions thereof.

VII.

The defendant California Consumers Company above referred to is, and at all times herein men-

Respondent's Exhibit A—(Continued)

tioned has been, a corporation organized and existing under the laws of the State of Delaware and duly authorized to do and doing business within the State of California.

VIII.

Plaintiff Luther S. Bell is an individual residing in the City of Los Angeles, County of Los Angeles, State of California, and is the owner and holder of twenty (20) shares of the preferred stock of said California Consumers Company.

Plaintiff Bell is informed and believes, and upon such information and belief alleges, that there are very many other preferred stockholders of said California Consumers Company, said preferred stock being widely held, and that it is impracticable to [107] bring them all before the court as parties plaintiff herein, and that for that reason he brings and joins in this action for the benefit of all other preferred stockholders of said California Consumers Company, the questions herein involved being a common or general interest.

During his ownership of his said stock he has received no dividends thereon.

IX.

Defendant Pacific Public Service Company is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of compliance with the laws of the State of Delaware and duly authorized to do and doing business within the State of California.

Respondent's Exhibit A—(Continued)

X.

Plaintiffs are informed and believe, and upon such information and belief alleges:

That defendant John A. Bullard, as Trustee, is Trustee for J. H. Bullard under a certain agreement dated October 24, 1931.

That defendant Citizens National Trust & Savings Bank of Los Angeles is a national banking association organized and existing under the laws of the United States and is Trustee under its Declaration of Trust No. 5375.

That defendant Young-Clarke & Company is, and at all times herein mentioned has been, a corporation duly organized and existing under the laws of the State of California.

That defendant H. F. Allen Estate Company is a corporation, but under the laws of what state it is organized plaintiffs are not advised.

That defendant Bank of America National Trust & [108] Savings Association is a national banking association organized and existing under the laws of the United States and is Trustee under its Agreement No. 19, dated May 25, 1928, with George P. Beck and Louis M. Beck, of Stockton, California.

That defendant Bush Street Investment Co. is a corporation, but under the laws of what state it is organized plaintiffs are not advised.

That defendant The Guiberson Corporation is a corporation organized and existing under the laws of the State of Delaware and duly authorized to do

Respondent's Exhibit A—(Continued)

and doing business under the laws of the State of California.

That defendant Red Salmon Canning Co. is a corporation, but under the laws of what state organized plaintiffs are not advised.

Defendant Clarence J. Wetmore, as Executor, is Executor of the Last Will and Testament of Grace C. Richards, deceased.

That defendant Dean Witter & Co. is a corporation organized and existing under the laws of the State of California.

XI.

Plaintiffs are ignorant of the true names of the defendants A Company, a corporation, B Company, a corporation, C Company, a corporation, D Company, a corporation, E Company, a corporation, F Company, a corporation, G Company, a corporation, H Company, a corporation, I Company, a corporation, J Company, a corporation, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe, Eight Doe, Nine Doe, Ten Doe, Eleven Doe, Twelve Doe, Thirteen Doe, Fourteen Doe, Fifteen Doe, Sixteen Doe, Seventeen Doe, Eighteen Doe, Nineteen Doe, Twenty Doe, Twenty-one Doe, [109] Twenty-two Doe, Twenty-Three Doe, Twenty-Four Doe, Twenty-Five Doe, Twenty-Six Doe, Twenty-Seven Doe, Twenty-Eight Doe, Twenty-Nine Doe and Thirty Doe. Said defendants are designated herein by fictitious names. When their true names are discovered or when the true name or

Respondent's Exhibit A—(Continued)
names of any of them are discovered this pleading
and proceeding will be amended accordingly.

XII.

Defendants A Company, a corporation, B Company, a corporation, C Company, a corporation, D Company, a corporation, E Company, a corporation, F Company, a corporation, G Company, a corporation, H Company, a corporation, I Company, a corporation, and J Company, a corporation, are each corporations organized and existing under the laws of the State of California or of other states of the United States.

XIII.

Plaintiffs are informed and believe, and upon such information and belief allege:

That at all times since prior to the 5th day of May, 1929, the defendants Pacific Public Service Company, a corporation, A Company, a corporation, B Company, a corporation, C Company, a corporation, D Company, a corporation, E Company, a corporation, One Doe, Two Doe, Three Doe, Four Doe and Five Doe have been the owners and holders of all issued and outstanding common stock of California Consumers Company and that since the early portion of the year 1929, the exact date being unknown to the plaintiffs herein, the defendant Pacific Public Service Company, a corporation, has been and still is the sole owner of all issued and outstanding common stock of said California Con-

sumers Company, now aggregating twenty-five thousand (25,000) shares of such common stock.

XIV.

Plaintiffs are informed and believe, and upon such information and belief allege, that all of the defendants herein named have been and are owners and holders of not less than seventy-two (72) shares each of the issued and outstanding preferred stock of California Consumers Company and that each of such defendants has received in the aggregate Two Thousand Dollars (\$2,000.00) or more as dividends upon such preferred stock during the ownership by each said defendant thereof, the aggregate number of shares of outstanding preferred stock at the date hereof being fifteen thousand three hundred forty-three (15,343) shares; that plaintiffs are uninformed as to the exact dates and number of shares acquired by each of said defendants; and that such information can be adduced only after a detailed accounting of the stock records of California Consumers Company, which records are in the possession and control of said company and its Board of Directors.

XV.

Plaintiffs are informed and believe, and upon such information and belief allege, that on outstanding preferred stock of California Consumers Company dividends were declared and paid at the dates and in aggregate amounts as follows:

7/1/28	\$ 26,250.00
10/1/28	26,250.00

Respondent's Exhibit A—(Continued)

1/1/29	26,250.00
4/1/29	26,250.00
7/1/29	26,250.00
10/1/29	26,278.00
1/1/30	27,039.25
4/1/30	27,125.00
7/1/30	27,153.00
10/1/30	27,483.75
1/1/31	27,676.25
4/1/31	27,702.50
7/1/31	27,566.00
10/1/31	27,583.50
1/1/32	27,454.00
4/1/32	27,464.50
totalling in all the sum of	\$431,775.75

XVI.

Plaintiffs are informed and believe, and upon such information and belief allege, that dividends were declared and paid on issued and outstanding common stock of said California Consumers Company upon the dates and in aggregate amounts as follows:

5/ 5/29	\$ 75,000.00
8/23/29	90,000.00
12/20/29	206,250.00
4/29/30	18,000.00
4/31/30	10,000.00
9/26/30	75,000.00
12/31/30	75,000.00
9/30/31	50,000.00
totalling in all the sum of	\$599,250.00

Respondent's Exhibit A—(Continued)

XVII.

Plaintiffs are informed and believe, and upon such information and belief allege, that at the times of the declaration and of the payment of the dividends referred to in paragraphs XV and XVI hereof and at each and all of said times, and throughout its entire corporate existence, said California Consumers Company had no surplus out of which such dividends or any thereof might lawfully be declared and paid, or declared or paid; that at all of said times, and at all times throughout its corporate existence it had a corporate deficit; that at none of said times, either when said dividends were declared and paid or at any time during its corporate existence, were its net assets in excess of its capital and that at all of said times the capital of said California Consumers Company has been and has remained diminished by depreciation in the value of its properties, by losses, and otherwise, to an amount less than the aggregate amount of the capital represented by the issued and outstanding shares of all classes having a preference upon the distribution of assets, and that such deficiency has not at any time been repaired; and that such corporate deficit has never been less than approximately Two Hundred [112] Thousand Dollars (\$200,000.00), and from time to time has exceeded half a million dollars.

XVIII.

Plaintiffs are informed and believe, and upon such information and belief allege:

Respondent's Exhibit A—(Continued)

That at all times prior to the 1st day of May, 1932, and when the dividends referred to in paragraphs XV and XVI hereof were declared and paid, the sole voting power and rights of said California Consumers Company were vested in the owners and holders of its common stock; that since a date in the year 1929, the exact date of which is unknown to plaintiffs, Pacific Public Service Company, a corporation, has been the sole owner of all of the issued and outstanding common stock of California Consumers Company.

That at all times since said Pacific Public Service Company became the sole owner of all issued and outstanding common stock it has dominated and controlled said California Consumers through the election of members of the Board of Directors of said California Consumers Company, that at all said times the members of the Board of Directors of California Consumers Company have been substantially identical with the members of the Board of Directors of Pacific Public Service Company and have been officers and/or directors of said last mentioned company; and that the declaration of dividends upon the common stock of said California Consumers Company was directed and controlled by such sole common stockholder, to-wit, Pacific Public Service Company.

XIX.

Plaintiffs Guy L. Goodwin, as Receiver, and
[113] Security-First National Bank of Los Angeles,

Respondent's Exhibit A—(Continued)

as Trustee, are informed and believe, and upon such information and belief allege, that the assets of California Consumers Company, which are subject to the lien of the indenture hereinabove referred to, if sold on foreclosure sale would yield an amount not more than one-half the present indebtedness of said California Consumers Company, as reflected by outstanding bonds, said bond indebtedness, including principal and interest, amounting at the present time to approximately the sum of Three Million Four Hundred Ninety Six Thousand Five Hundred Dollars (\$3,496,500.00); that said Trustee would upon any such sale of assets under foreclosure be entitled to a deficiency judgment for the amount thereof, which would total materially in excess of One Million Dollars (\$1,000,00.00); that whatever rights there may be in California Consumers Company to recover dividends unlawfully paid as herein referred to, are assets of said California Consumers Company, to the avails of which or to a participation in which the plaintiff Receiver and plaintiff Trustee are lawfully entitled for the benefit of the owners and holders of bonds issued under the provisions of the indenture mentioned; that said California Consumers Company is insolvent; that such indebtedness on the 1st day of October, 1933, amounted to in excess of Three Million Five Hundred Thousand Dollars (\$3,500,000.00); and that said company had been insolvent for some time prior thereto the exact time during which and

Respondent's Exhibit A—(Continued)
since when it had been insolvent being unknown to the plaintiffs herein.

XX.

Plaintiffs are informed and believe, and upon such information and belief allege, that by reason of the facts set forth in paragraph XVII hereof said declarations and payments of dividends as mentioned in paragraph XV and XVI hereof were invalid and unlawful, and that plaintiffs upon behalf of said California [114] Consumers Company are entitled to require that the amounts so paid be recovered from the payees thereof, respectively, together with interest thereon at the legal rate from the date of each such dividend disbursement.

XXI.

Dominated and controlled by its sole common stockholder since 1929, to-wit, Pacific Public Service Company, California Consumers Company has failed and refused to bring any such action. Accordingly, this action is brought by the plaintiffs herein upon behalf of said California Consumers Company. Any demand that it bring such action would have been unavailing and useless for the reason that the members of the Board of Directors were at all times substantially all and at some time entirely all members of the Board of Directors of or officers of said Pacific Public Service Company, against which company, among other defendants, a recovery is herein sought.

Respondent's Exhibit A—(Continued)

XXII.

Only since the appointment of the Receiver herein on the 2nd day of December, 1933, have the facts herein alleged been ascertained. His appointment resulted from the foreclosure action above mentioned, brought by the plaintiff Trustee after the bond default above referred to. But notwithstanding the facts set forth in the next preceding paragraph the plaintiffs herein served upon said California Consumers Company and upon its Board of Directors, on the 28th day of December, 1933, a request and demand, in words and figures as follows:

“To California Consumers Company,
225 Bush Street,
San Francisco, California,
230 West Jefferson Street,
Los Angeles, California, and

To The Board of Directors thereof:

The undersigned, (a) Guy L. Goodwin, the duly appointed, qualified and acting Temporary Receiver on [115] foreclosure of mortgaged property pursuant to order dated the 2nd day of December, 1933, in that certain action pending in the District Court of the United States, for the Southern District of California, Central Division, entitled “Security-First National Bank of Los Angeles, as Trustee, Plaintiff, vs. California Consumers Company, a corporation, Defendant,” Equity No. 122-C, (b) Security-First National Bank of Los Angeles, as

Respondent's Exhibit A—(Continued)

Trustee under the provisions of that certain Trust Indenture dated as of the 2nd day of April, 1928, between California Consumers Company and Los Angeles-First National Trust & Savings Bank, predecessor of said Security-First National Bank of Los Angeles, recorded April 27, 1928, in Book 7115, page 83, of Official Records of the County of Los Angeles, the foreclosure of the lien of which indenture is the purpose, among others, of the action above referred to and (c) Luther S. Bell, an owner and holder of twenty (20) shares of the preferred stock of California Consumers Company, hereby, jointly and severally, request and demand that forthwith you demand, sue for, collect and receive (1) from Pacific Public Service Company, your present sole common stockholder, and any and all other common stockholders from time to time heretofore, the amount of all dividends upon common stock of California Consumers Company heretofore declared and paid to them and/or to any of them, amounting in the aggregate to approximately Six Hundred Thousand Dollars (\$600,000.00), plus interest at the legal rate upon each dividend disbursement from the respective date of each such disbursement, and (2) from the owners and holders, past and present, of all shares of preferred stock of California Consumers Company, the amount of all dividends thereon heretofore declared and [116] paid to each such owner and holder respectively during his, her and/or its ownership thereof, amounting in the aggregate to approximately Four Hundred

Respondent's Exhibit A—(Continued)

Thirty-five Thousand Dollars (\$435,000.00), plus interest at the legal rate upon each dividend disbursement from the respective date of each such disbursement.

This request and demand is made for the following reasons and upon the following grounds, namely: (a) That at no time during the corporate existence of California Consumers Company has it had a surplus out of which such dividends or any thereof might lawfully be declared and/or paid; (b) that at all times during its corporate existence it has had a corporate deficit; (c) that at no time during its corporate existence have its net assets been in excess of its capital, and (d) that the capital of said California Consumers Company has at all times been and has remained diminished by depreciation in the value of its properties, by losses, and otherwise, to an amount less than the aggregate amount of the capital represented by the issued and outstanding shares of all classes having a preference upon the distribution of assets, and that such deficiency has not at any time been repaired.

Respondent's Exhibit A—(Continued)
Los Angeles, California, December 28th, 1933.

GUY L. GOODWIN

Temporary Receiver appointed by order dated December 2, 1933, in said Equity Case No. 122-C.

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES,
as Trustee,

[Seal] By W. N. BUCKLIN, Jr.
Its Vice-President.

Attest:

C. C. HOGAN

Asst. Secretary.

LUTHER S. BELL

Preferred Stockholder. [117]

Said demand has not been complied with, nor has any reply thereto been received.

XXIII.

All books and records of said California Consumers Company relating to declaration of dividends and all of its stock books and records are in the possession and custody of said California Consumers Company and its Board of Directors. Plaintiffs have no exact or detailed information as to the individual amounts and the individual dates on which such dividends were paid to individual common stockholders and individual preferred stockholders, parties defendant herein, except as herein set forth. In order to arrive at exact facts with respect thereto it is necessary that an accounting be had, in the interests of equity and fairness to

Respondent's Exhibit A—(Continued)

California Consumers Company, its bondholders, other secured creditors, unsecured creditors, and preferred stockholders entitled to share in the ultimate distribution of its assets, and that all such books and records be made available to the plaintiffs herein.

XXIV.

By assignment made, executed and delivered the 1st day of December, 1933, all accounts receivable, bills receivable, cash on hand and in bank, materials and supplies, commodities constituting a whole or any part of stock of merchandise kept for sale, contracts and operating agreements with other companies, leases and leasehold interests, and all shares of stock, bonds and other securities not specifically transferred or assigned to or pledged with the Trustee upon the execution and delivery of the indenture above referred to, as mentioned in paragraph V hereof, were transferred, assigned and delivered to the plaintiff Security-First National Bank of Los Angeles, as Trustee, in accordance with the provisions of said indenture, namely, that upon the occurrence of [118] an event of default all such excepted assets shall become and be subject to the lien of said indenture, and be forthwith delivered to the Trustee. Said formerly excepted assets are now and since said 1st day of December, 1933, have been subject to the lien of said indenture.

XXV.

Plaintiffs herein hereby offer and agree to do

Respondent's Exhibit A—(Continued)
and perform whatever may be equitable and just in the premises.

Wherefore, plaintiffs pray:

1. That an accounting by each of the defendants herein, other than the defendant California Consumers Company, of all dividends paid to each such defendant upon the common stock and upon the preferred stock of California Consumers Company owned and held by each such defendant respectively, showing amounts and dates of payment, be ordered by this Court;

2. That defendant California Consumers Company do have and recover from defendants Pacific Public Service Company, A Company, B Company, C Company, D Company, E Company, One Doe, Two Doe, Three Doe, Four Doe and Five Doe the amount of all dividends paid to them respectively upon the common stock of said California Consumers Company, amounting in the aggregate to approximately the sum of Six Hundred Thousand Dollars (\$600,000.00), and not less than the sum of Five Hundred Ninety Nine Thousand Two Hundred Fifty Dollars (\$599,250.00), plus interest at the legal rate upon each such dividend disbursement from the respective date of each such disbursement to the time of trial herein;

3. That defendant California Consumers Company do have and recover from each and all of the defendants herein, other than itself as defendant, the amount of all dividends upon preferred stock

Respondent's Exhibit A—(Continued)

of California Consumers Company paid to each such defendant respectively during his, her and/or its ownership thereof, amounting [119] in the aggregate to approximately Four Hundred Thirty Five Thousand Dollars (\$435,000.00), and not less than the sum of Four Hundred Thirty One Thousand Seven Hundred Seventy Five & 75/100 Dollars (\$431,775.75), plus interest at the legal rate upon each dividend disbursement from the respective date of each such disbursement to the time of trial herein;

4. That the plaintiffs be allowed and that they recover from defendants all of their costs and expenses attendant upon or incidental to this proceeding; and

5. That the plaintiffs and said defendant California Consumers Company have all such other and further relief as may be meet and just in the premises.

O'MELVENY, TULLER &
MYERS,

WALTER K. TULLER,

PIERCE WORKS,

GRAHAM L. STERLING, Jr.

BAUER, MACDONALD,

SCHULTHEIS & PETTIT,

ALEXANDER MACDONALD,

FRED E. PETTIT, Jr.,

ROBERT H. EDWARDS, Jr.,

Attorneys for Plaintiffs [120]

Respondent's Exhibit A—(Continued)

State of California

County of Los Angeles—ss.

Guy L. Goodwin, as Temporary Receiver on foreclosure of mortgaged property, under Order dated December 2, 1933, In Equity, Cause No. 122-C, in the United States District Court, for the Southern District of California, Central Division, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

GUY L. GOODWIN,

Subscribed and sworn to before me this 29th day of December, 1933.

[Seal] KATIE V. TADLOCK,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed, 3:56 p. m., Dec. 29th, 1933.

PETITIONERS' EXHIBIT NO. 2

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 367553

GUY L. GOODWIN, as Temporary Receiver, etc.,
et al.,

Plaintiff,

vs.

PACIFIC PUBLIC SERVICE COMPANY, a
corporation, et al.,

Defendants.

STIPULATION

It Is Hereby Stipulated by and between O'Melveny, Tuller & Myers, and Bauer, Macdonald, Schultheis & Pettit, attorneys for the above named plaintiffs, and Lawler & Degnan, attorneys for the following named defendants, Pacific Public Service Company, California Consumers Company, and Bush Street Investment Company, that the defendants so named do hereby enter their appearance in the above entitled action, and that the time of said defendants within which to answer, plead or otherwise move, as it may be advised, to plaintiffs' complaint on file herein, is hereby extended until thirty (30) days after service upon said Lawler & Degnan of written notice to so plead.

It Is Further Stipulated and Agreed that plaintiffs need not bring the above action to trial within two years from the filing of the complaint in the above matter.

Dated September 24th, 1935.

BAUER, MACDONALD,
SCHULTHEIS & PETTIT

By /s/ ALEXANDER MACDONALD,
/s/ FRED E. PETTIT, Jr.
/s/ ROBERT H. EDWARDS

O'MELVENY, TULLER &
MYERS

By /s/ WALTER K. TULLER,
/s/ PIERCE WORKS,
/s/ GRAHAM L. STERLING, Jr.

Attorneys for Plaintiffs

LAWLER & DEGNAN

By /s/ M. PHILIP DAVIS

Attorneys for Defendants Pacific Public Service
Company, California Consumers Company, and
Bush Street Investment Company.

I hereby certify that the foregoing instrument
is a correct copy of the original record in this office
same having been filed Sep. 25, 1935.

Attest November 23, 1943.

[Seal] J. F. MORONEY,

County Clerk and Clerk of the Superior Court of
the State of California in and for the County
of Los Angeles.

/s/ M. JACKSON,
Deputy.

[Endorsed]: T.C.U.S. Filed Nov. 26, 1943.

The Tax Court of the United States

Docket No. 2159

PACIFIC PUBLIC SERVICE COMPANY,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SUPPLEMENTAL STIPULATION OF FACT

It is mutually stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true in this proceeding without prejudice to the right of either party to offer further evidence not inconsistent with the facts herein stipulated and subject further to the right of either party to object to any of the facts herein stipulated upon the grounds of immateriality.

1. Petitioner's basis for the 25,000 shares of common stock of the California Consumers Company described in paragraph 7 of the stipulation of fact herein was \$6,000.

Dated San Francisco, California, September 29,
1944.

G. S. BORDEN

SIGVALD NIELSON

SCOTT C. LAMBERT

Counsel for Petitioner.

J. P. WENCHEL

Chief Counsel, Bureau of In-
ternal Revenue, Counsel for
Respondent.

[Endorsed]: T.C.U.S. Filed Oct. 13, 1944. [124]

The Tax Court of the United States

Pacific Public Service Company, Petitioner, v.
Commissioner of Internal Revenue, Respondent.

Docket No. 2159. Promulgated February 8, 1945.

FINDING OF FACT AND OPINION

Cancellation of common stock and exchange of bonds, preferred stock, and demand note for securities of new corporation in 77B proceeding, held to result in tax-free exchange and consequent carry-over of old basis of the bonds and preferred stock but not of the common stock and demand note.

Scott C. Lambert, Esq., Granville S. Borden, Esq., and Sigvald Nielson, Esq., for the petitioner.

Harold D. Thomas, Esq., for the respondent.

This proceeding was brought for a redetermination of a deficiency in petitioner's income tax for

the year 1940 in the amount of \$7,343.21. Petitioner claims an overpayment of tax for that year in the amount of \$30,488.15.

A claimed additional deduction of \$873.40 for capital stock tax is conceded by respondent.

The question presented relates to the basis of securities sold by petitioner in the taxable year which had been obtained pursuant to a reorganization under section 77B of the Bankruptcy Act.

The case was presented upon stipulation, supplemental stipulation, and testimony adduced at the hearing. Those facts hereinafter appearing which are not from the stipulation are otherwise found from the record.

FINDINGS OF FACT

The stipulated facts are hereby found accordingly.

Petitioner is a corporation organized under the laws of the State of California, with its principal office in San Francisco. Its income tax return for the year 1940 was filed with the collector of internal revenue for the first California district.

On September 25, 1940, and on October 7, 1940, petitioner sold to Turner Poindexter & Co. of Los Angeles all of its bonds and shares of stock in California Consumers Corporation for amounts aggregating [125] \$19,654.85. The sales were arm's-length transactions between a willing buyer and a willing seller.

The amounts received for each, the cost basis claimed, and the loss claimed by petitioner on its return for the taxable year were as follows:

Item	Amount received	Cost basis claimed on return	Loss claimed on return
\$75,000 principal amount of bonds with participating certificates for 600 shares of stock held by voting trustees	\$18,750.00	*\$54,877.66	\$36,181.38
1,353 shares stock	263.82	51,001.75	50,737.93
3,287.5 shares stock	641.03	6,246.25	5,605.22
Total.....	19,654.85	112,125.66	92,524.53

* Expense of \$53.72 was also claimed.

In arriving at the cost basis of the 3,287.5 shares on the return petitioner used a value of \$1.90 per share.

In the petition, petitioner claims a cost basis of \$478,270 (the amount of the note hereinafter referred to) for the 3,287.5 shares above referred to.

California Consumers Co. (hereinafter sometimes called Consumers), a Delaware corporation, was organized on March 20, 1928. It operated both directly and indirectly, through various subsidiary companies, an extensive ice and cold storage business in southern California. Operations by Consumers during the years 1932 and 1933 resulted in losses. On October 1, 1933, Consumers defaulted in the payment of the semiannual interest due on its first mortgage series A bonds and on December 1, 1933, it was insolvent. Accordingly, on December 3, 1933, the trustee under the indenture securing the bonds filed a bill of complaint for the foreclosure of the indenture in the United States District Court at Los Angeles and requested the appointment of a receiver of the properties ancillary

to and pending the outcome of the foreclosure action. On that date the court appointed a receiver, and thereafter and until the consummation of the March 1, 1935, agreement the properties were operated by the receiver.

The plan of reorganization set forth in the agreement dated March 1, 1935, was formulated and composed by committees representing the bondholders, the preferred stockholders, and petitioner as unsecured creditor of Consumers. The plan, provisions, and terms of this agreement were confirmed by the United States District Court for the Second District of California, Second Division, on September 30, 1935, and carried out and consummated in 1935, under the provisions of section 77B of the Federal Bankruptcy Act. [126]

In 1928 petitioner acquired 15,000 shares of common stock of Consumers, which constituted at that time all the issued and outstanding shares of common stock. On June 10, 1930, petitioner acquired 10,000 additional shares of common stock by reason of a declaration of a dividend of 10,000 shares on the 15,000 shares. Petitioner thereafter, until the time of the transaction covered by the agreement dated March 1, 1935, held all the issued and outstanding common stock of Consumers, consisting of 25,000 shares. The basis for these 25,000 shares was \$6,000.

At intervals between April 1931 and July 1933 petitioner acquired a total of 902 shares of preferred stock of Consumers at a cost of \$51,001.75 and bonds of the company in the principal amount

of \$75,000 at a cost of \$54,877.66. These purchases were made on the open market and the stock and bonds were held by petitioner up to the time of the transaction covered by the March 1, 1935, agreement.

Prior to May 31, 1933, petitioner had made cash advances to Consumers which totaled \$478,270. On that date Consumers made a promissory note, payable on demand and bearing interest at 5 per cent per annum, in the amount of \$478,270 in favor of petitioner, evidencing an indebtedness of that amount. Prior to March 1, 1935, petitioner had not received any payment on account of this indebtedness.

Operations by Consumers resulted in losses and in December 1933 it was insolvent. Excepting liabilities to the subsidiaries and affiliated companies, its liabilities (exclusive of capital stock) at that time were as follows:

\$3,496,500 principal amount First Mortgage Series "A" bonds dated April 2, 1928, of which petitioner held \$75,000 principal amount;

\$478,270 unsecured promissory note held by petitioner.

As of December 2, 1933, Consumers had stock outstanding as follows:

15,343 shares \$7 cumulative preferred stock, no par value, of which petitioner held 902 shares;

25,000 shares of no par common stock, held by petitioner.

All the interested parties accepted the plan of reorganization set forth in the agreement dated

March 1, 1935. In accordance with the provisions of the plan requiring a new corporation, California Consumers Corporation (hereinafter sometimes called the new company) was organized in 1935, under the laws of the State of California, and in that year acquired the properties referred to in the plan, which constituted all or substantially all of the properties which had been owned and operated by Consumers, and issued \$3,496,500 principal amount of bonds and 54,274 shares of stock as provided in article III of the plan. The parties who prior to the plan held bonds, stock, and the [127] note of the company, received pursuant to the plan the following interests in the new company:

Holding in Consumers	Interest in new company received
\$3,496,500 principal amount of bonds (of which \$75,000 principal amount was held by petitioner)	\$3,496,500 principal amount of bonds and 27,972 participating certificates for 27,972* shares of stock
15,343 shares no par value preferred stock (of which 902 shares were held by petitioner)	23,014.5 shares
\$478,270 unsecured demand note (held by petitioner)	3,287.5 shares
25,000 shares common stock (held by petitioner)	Nothing
Total.....	\$3,496,500 bonds; 54,274 shares

*Stipulated, but apparently in error, as 29,972 shares.

By reason of its respective holdings of bonds and stock and the note of Consumers, petitioner,

as a result of the consummation of the plan, received the following:

Holdings in Consumers	Interest in new company received
\$75,000 principal amount of bonds	\$75,000 principal amount of bonds with participating certificates for 600 shares of common stock held by voting trustees
902 shares preferred stock	1,353 shares of common stock
\$478,270 note—unsecured	3,287.5 shares of common stock
25,000 shares common stock	Nothing

The bonds and stock of the new company which petitioner received were the bonds and stock which petitioner sold in the taxable year.

The bonds of Consumers had been first mortgage bonds, dated April 1, 1928, maturing in twenty years, but subject to earlier redemption upon payment of principal and accrued interest, computed on a specified formula according to the date of redemption.

The bonds of the new company were to be dated as of such date as the bondholders' committee should designate and, subject to certain provisions allowing earlier redemption, matured twenty years from their date. They bore an interest rate of 5 per cent, of which 3 per cent was designated "fixed interest" (i.e., unconditionally due), payable in semiannual installments, and the remaining 2 per cent designated as "income interest" payable in annual installments only if and to the extent that the net income of the new company and its subsidiaries on a consolidated basis for the twelve-

month period ended two months prior to the interest date was available for the payment of interest. The bonds further provided that "Net income shall be deemed to be available for the payment of income interest only if the payment thereof [128] will not reduce the net working capital of the new corporation and its subsidiaries * * *, to an amount insufficient for the needs of the business as determined from time to time by the board of directors and, so long as the voting trust agreement is in existence, approved by at least a majority of the voting trustees."

Income interest not earned and available in any annual period did not accumulate. The new bonds also contained provisions for establishment of a sinking fund. Such bonds were, according to the plan, secured by a new trust indenture upon all of the properties acquired. The bondholders' committee was given the right to select the trustee under the new indenture.

Paragraph 7 of article IV of the plan contains the following:

The new trust indenture shall provide that with the consent of the holders of seventy-five per cent (75%) in principal amount of new bonds then outstanding:

(a) The new trust indenture may be released and the new bonds satisfied (but only with the written consent of the Commissioner of Corporations of the State of California so long as there is such a commissioner) upon payment or delivery

to the trustee for the benefit of the holders of all the new bonds then outstanding, of a consideration (which may be money, securities or any other consideration), which consideration may be less than the principal amount of the new bonds then outstanding;

(b) With the consent of the new corporation and the trustee, any of the terms and provisions of the new trust indenture or the new bonds may be altered, eliminated or supplemented; or

(c) The new trust indenture may be subordinated to a new mortgage or trust deed or other encumbrance for such purposes and in such amount as such percentage of the holders of the new bonds then outstanding shall approve.

The plan also provided for the dismissal, with prejudice to all parties plaintiff, of a dividend suit filed December 29, 1933, in the Superior Court of California against petitioner, seeking the recovery of the amount of certain dividends alleged to have been illegally declared and paid on both preferred and common stock of Consumers, in the sum of approximately \$1,000,000.

Petitioner has never claimed any portion of the unsecured indebtedness of Consumers as partially or wholly worthless in any of its income tax returns, nor has petitioner received any tax benefit through bad debt deductions with respect thereto. No part of petitioner's cost of preferred stock and bonds of Consumers or of its common stock and bonds of the new company has been claimed or

allowed as a deduction or otherwise in any tax return filed by petitioner prior to 1940.

Petitioner reported a net loss on its Federal income tax returns for 1933, 1934, and 1935, and no tax has been paid by petitioner for those years.

As of December 31, 1933, petitioner wrote down its investment in the bonds of Consumers to \$15,000, petitioner's estimate of their fair market value as of that date, and wrote down the balance of its investments and note to \$1.

OPINION.

Opper, Judge: In order to compute the deductible loss sustained by petitioner upon a sale in the instant tax year it becomes necessary to fix a basis for the securities which it sold. This in turn involves the question whether the transaction by which petitioner received the stock through a 77B reorganization in exchange for certain interests in a predecessor company was such that petitioner's loss was then recognizable and a new basis acquired, or whether, as petitioner contends, it retained its original basis. This is the sole issue.

The nonrecognition is claimed under three theories—first, that it was an exchange of property for stock under section 112 (b) (5); second, that it was an exchange of stock or securities for stock or securities in a reorganization; and, third, that it is in any event covered by the new provisions,¹

¹Section 112 (1):

“(1) General Rule.—No gain or loss shall be recognized upon an exchange consisting of the

particularly section 112 (1), added by the Revenue Act of 1943.

It seems clear at the outset that this could not have been an exchange under 112 (b) (5). That section requires an identity of interest before and after the exchange, as well as an ownership or control of 80 per cent in the same persons. It is stipulated that prior to the 77B reorganization the old company was insolvent. It might follow from

relinquishment or extinguishment of stock or securities in a corporation the plan of reorganization of which is approved by the court in a proceeding described in subsection (b) (10) [under section 77B of the National Bankruptcy Act], in consideration of the acquisition solely of stock or securities in a corporation organized or made use of to effectuate such plan of reorganization.

“(2) Exchange Occurring in Taxable Years Beginning Prior to January 1, 1943.—If the exchange occurred in a taxable year of the person acquiring such stock or securities beginning prior to January 1, 1943, then, under regulations prescribed by the Commissioner with the approval of the Secretary, gain or loss shall be recognized or not recognized——

“(A) to the extent that it was recognized or not recognized in the final determination of the tax of such person for such taxable year, if such tax was finally determined prior to the ninetieth day after the date of the enactment of the Revenue Act of 1943; or

“(B) in cases to which subparagraph (A) is not applicable, to the extent that it would be recognized or not recognized under the latest treatment of such exchange by such person prior to December 15, 1943, in connection with his tax liability for such taxable year.”

this that the creditors would then step into the shoes of the stockholders and at least upon the institution of the receivership would so far succeed to the entire proprietary interest in the debtor that a delivery to them of all of the stock of the reorganized corporation would satisfy the requirements of identity of interest established by 112 (b) (5). *Helvering v. Cement Investors, Inc.*, 316 U. S. 527. But here the creditors, who on that theory would be entitled to all of the proprietary interest in the new corporation and its assets, and certainly at least to a controlling interest, acquired but 48 per cent of the new stock and the secured creditors but 42 per cent, petitioner as holder of an unsecured demand note obtaining the other 6. The preferred shareholders, who on the insolvency theory would be regarded as wiped out, obtained a majority interest. And it will not do to say that the insolvency theory might be disregarded, for that is the sole reason advanced for the complete elimination of the common shareholders.

By the same token, of course, the requirement that the owners of the property transferred shall retain a control of not less than 80 per cent likewise acts as a bar to the application of 112 (b) (5). Not only did the creditors of the insolvent old corporation, the presumptive owners of all of its property, acquire less than an 80 per cent interest in the transferee; they received, as has been pointed out, less than a 50 per cent interest. If the financial condition of the old company was such that the interests in its assets were properly allocated

as between creditors and preferred shareholders—a finding which incidentally would contradict the stipulated fact of insolvency²—that conclusion would have to appear from evidence of the assets and liabilities involved. In the absence of such evidence, it can not be assumed that the exchange in question was nontaxable under 112 (b) (5). *Bunker Hill & Sullivan Mining & Concentrating Co.*, 1 T. C. 1057, 1074.

Consideration of section 112 (b) (3) requires a separation of the various interests involved. Petitioner acted in four capacities. It was the owner of all of the common stock of the old company, as well as some of the preferred. It held its unsecured demand note for almost half a million dollars. And it owned some of the bonds. Under the plan of reorganization petitioner received blocks of common stock of the new company, the only class issued, in exchange for its bonds and preferred stock, and an additional common stock interest in exchange for the demand note. It received nothing for its common stock. This we think completely eliminates the latter as a part of petitioner's retained basis. Section 112 (b) (3) relates exclusively to exchanges. Since the common stock was exchanged for nothing, the loss was complete at that time. No part of petitioner's original basis

²“* * * The full priority rule of *Northern Pacific R. Co. v. Boyd*, 228 U. S. 482 * * * gives creditors, whether secured or unsecured, the right to exclude stockholders entirely from the reorganization plan when the debtor is insolvent. * * *” *Helvering v. Alabama Asphaltic Limestone Co.*, 315 U. S. 179.

for the common stock may hence be included as any part of its retained basis for the stock of the new company.

As to the exchange of bonds for bonds and common stock and of preferred stock for common, no question arises concerning the existence of an exchange and, since the old bonds and preferred stock were clearly securities of the old company, that portion of the requirements of section 112 (b) (3) is met. There might have been some doubt whether the exchange was the result of a statutory reorganization under the principle of *Helvering v. Southwest Consolidated Corporation*, 315 U. S. 194, and *Helvering v. Cement Investors, Inc.*, *supra*. But, as will subsequently appear, this factor has been eliminated by the 1943 amendment. The consequence is that the claimed loss on that part of the new stock and bonds acquired in exchange for the bonds and for the preferred stock may be allowed.

When, however, we come to the exchange of the unsecured demand note for additional stock in the new company, we are met with the difficulty that the section requires an exchange of stock or securities for other stock or securities. It is clear that the demand note was not stock. It appears to be equally clear that it was not of sufficient dignity to be considered a security. *Bunker Hill & Sullivan Mining & Concentrating Co.*, *supra*; *Commissioner v. Sisto Financial Corporation* (C. C. A., 2d Cir.), 139 Fed. (2d) 253. No case has been found where a tax-free exchange under section 112 (b) (3) was held to have resulted from the exchange of a de-

mand note. The inclusion of such an exchange in the entire plan, like the payment of cash, might not prevent that section from applying to exchanges otherwise encompassed within the described class of transactions. See *United Gas Improvement Co.*, 47 B. T. A. 715; *affd.* (C. C. A., 3d Cir.), 142 Fed. (2d) 216; *certiorari denied*, — U. S. — (Oct. 9, 1944). And long term notes, especially where a number of them are outstanding, may represent such an interest as to be considered securities. *Burnham v. Commissioner* (C. C. A., 7th Cir.), 86 Fed. (2d) 776; *certiorari denied*, 300 U. S. 683; *Commisisoner v. Huntzinger* (C. C. A., 10th Cir.), 137 Fed. (2d) 128. But to hold that a short term or demand note is a security in the face of such cases as *Pinellas Ice & Cold Storage Co. v. Commissioner*, 287 U. S. 462, construing the same word in the same section and holding that short term notes “were not securities within the intendment of the Act,” seems to us unjustifiable.

United Gas Improvement Co., *supra*, is not to the contrary. There the opinion on review observes:

* * * From what we have already pointed out, it seems clear that U. G. I.’s economic interest in Nashville continued uninterrupted throughout. After the reorganization, just as before, U. G. I. was the substantial owner of Nashville.

* * * * *

* * * In substantial effect, the cancellation of the debt was but a contribution by the sole owner of the reorganized company to the capital of the

company * * * By just so much as U. G. I. thus contributed was its stock interest in the reorganized company benefited. * * *

Here petitioner may either be regarded as the sole stockholder prior to the reorganization, but that interest was wiped out by it, or it may be regarded as a creditor, in which event its interest was recognized to the extent of a minor share in the new company's common stock. Viewed from either standpoint, petitioner's release of its unsecured demand note is not comparable to the capital contribution of a sole shareholder such that the receipt of the stock at that time would prevent its deducting as a loss the uncollected portion of the debt. See *Estate of Isadore L. Myers*, 1 T. C. 100, appeal dismissed (C. C. A., 4th Cir.); *Bunker Hill & Sullivan Mining & Concentrating Co.*, *supra*. It follows that neither the basis for the common stock nor the amount represented by the demand note carried over as a part of petitioner's basis for the new stock.

The only change in the situation resulting from the 1943 amendment is, as has been suggested, that any doubt as to the tax-free character of the transaction involving the bonds and preferred stock has been eliminated. That section still requires that there be an exchange of stock or securities which would not include the demand note. It permits, it is true, the relinquishment of an interest, as well as its exchange, but that must be in consideration of the receipt of stock or securities. Thus, petitioner's relinquishment of its common stock with-

out any consideration equally fails to come within the amendment.

There can, however, be little doubt that, whether or not the transaction in question was a reorganization under section 112 (g), it does comply with the requirements of section 112 (l), since there was a 77B proceeding and the new company was employed to carry out the terms of the reorganization there adopted. Respondent insists that the section is inapplicable because it does not appear that petitioner definitely and formally treated the transaction as nontaxable in its prior dealings. We think, however, that failure to deduct the loss on its original return, coupled with the fact that no question has been raised by respondent and no subsequent amendment has been attempted by petitioner, leaves the entire matter in a state of as complete finality as could possibly have been achieved under the circumstances. We do not read respondent's regulations as calling for more. See *James F. Curtis*, 3 T. C. 648.

Decision will be entered under Rule 50. [133]

The Tax Court of the United States

Docket No. 2159

PACIFIC PUBLIC SERVICE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Respondent having on March 13, 1945, filed a recomputation of tax for entry of decision as in accordance with the Findings of Fact and Opinion of the Court promulgated February 8, 1945, and hearing having been had thereon on April 18, 1945, at which time the recomputation of respondent was not contested by petitioner, now, therefore, it is

Ordered and Decided: That claim for refund was filed on April 22, 1942, and that there is an overpayment in income tax for the year 1940 in the amount of \$117.82, which amount was paid on December 15, 1941, and within the time provided by section 322(d) of the Internal Revenue Code.

Entered: April 20, 1945.

(Signed) CLARENCE V. OPPER,
Judge. [134]

In the United States Circuit Court of Appeals for
the Ninth Circuit

T. C. Docket No. 2159

PACIFIC PUBLIC SERVICE COMPANY,
Petitioner on Review,
vs.

JOSEPH D. NUNAN, JR., Commissioner of Internal Revenue,
Respondent on Review.

PETITION FOR REVIEW AND ASSIGN-
MENTS OF ERROR

To: The Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Now comes Pacific Public Service Company by its attorneys, Felix T. Smith, Sigvald Nielson, Granville S. Borden and Scott C. Lambert, and respectfully shows:

I.

JURISDICTION

Petitioner on review, Pacific Public Service Company, [135] is a corporation organized under the laws of the State of California, with its principal office at 225 Bush Street, San Francisco, California. Petitioner filed its Federal income tax return for the calendar year, 1940, with the Collector of Internal Revenue at San Francisco, California. The office of the Collector is within the jurisdiction of the United States Circuit Court of Appeals for

the Ninth Circuit. Your petitioner filed this petition pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

II.

PRIOR PROCEEDINGS

On March 26, 1943, respondent, Commissioner of Internal Revenue, determined a deficiency in income tax for the calendar year 1940 in the sum of \$7,343.21 and sent to your petitioner by registered mail a notice of said deficiency. Thereafter, on June 17, 1943, the petitioner filed a petition with the Tax Court of the United States and therein alleged that there was no deficiency and alleged an overpayment of \$30,488.15. The case was heard and tried before the Tax Court of the United States on November 26, 1943, at San Francisco, California. On February 8, 1945, [136] the Tax Court of the United States promulgated its opinion (4TC No. 87) and on April 20, 1945, entered its decision determining an overpayment in income tax of petitioner in the amount of \$117.82.

III.

NATURE OF THE CONTROVERSY

The question involved is the amount of loss sustained by petitioner in 1940 from the sale of bonds and stock of California Consumers Corporation. This question depends in turn upon a determination of the basis of said bonds and stock in the hands of petitioner at the time of their sale in 1940. The determination of petitioner's basis is the sole issue in the case.

The stock and bonds of California Consumers Corporation sold by petitioner in 1940 were acquired in 1935, pursuant to a reorganization under section 77B of the Bankruptcy Act. In 1933, in consequence of a default in interest payment on its first mortgage bonds, California Consumers Company became insolvent and the trustee started foreclosure proceedings in the Federal District Court. The Court appointed a receiver who operated the properties until 1935 when the plan of reorganization, formulated and composed [137] by committees representing the bond holders, preferred stock holders and petitioner as unsecured creditor, was consummated by the Court.

Under the terms of the reorganization plan, petitioner relinquished its shares of common stock of the insolvent company and exchanged its bonds, preferred stock and unsecured note of the insolvent company in consideration of the receipt of new bonds and stock of the California Consumers Corporation.

Respondent in his notice of deficiency and before the Tax Court contended that the reorganization exchange in 1935 gave rise to gain or loss to petitioner and petitioner's basis for the bonds and stock of the new company was the fair market value of such securities at the time of acquisition in 1935.

Petitioner contended before the Tax Court that the 1935 transaction was one from which no gain or loss was recognizable because of the application of section 112(b) (5) of the Revenue Act of 1934;

that it was a tax free reorganization within the scope of section 112(g)(1)(B) of the Revenue Act of 1934, as amended and therefore petitioner's exchange was exempt from gain or loss under section 112(b)(3) of said Act; and that in any event the transaction came within the [138] scope of section 112(1), as added by section 121 of the Revenue Act of 1943; and that as a result of the application of any of these non-recognition provisions, and of the related basis provision section 113(a)(6) as amended, petitioner's basis for the stock, bonds and note of the old insolvent company carried over as its substituted basis for the securities in the new company.

The Tax Court held that the exchange of bonds and preferred stock of the old company for bonds and stock of the new company came within the scope of either section 112(b)(3) or section 112(1) or both and the basis for the securities so exchanged carried over to the new securities. But the Court held the exchange of the note for new stock was not a tax free exchange and the basis for said note did not carry over. Similarly it was held the relinquishment of the common stock gave rise to a loss in 1935 and the basis therefor was not carried over to the new securities.

IV.

ASSIGNMENTS OF ERROR

Your petitioner avers that in the record and proceedings before the Tax Court of the United States and the opinion and final decision entered by the

Tax Court of the United States, manifest errors occurred and intervened to [139] the prejudice of your petitioner who now assigns the following errors and each of them which it avers occurred in said record, proceeding, opinion and final decision so rendered and entered by the Tax Court of the United States.

The Tax Court of the United States erred:

1. In holding that the transaction by which petitioner received stock and bonds of California Consumers Corporation in a 77B reorganization in exchange for stock, bonds and a note of a predecessor company, California Consumers Company did not come within the scope of section 112(b)(5) of the Revenue Act of 1934;

2. In holding that the exchange of the note of the California Consumers Company for stock of the new company did not fall within the provisions of section 112(b)(3);

3. In separating a single unified transaction, i.e., said plan of reorganization in 1935, into four separate exchanges, certain of which were held to be tax free and others of which were held subject to the recognition of gain or loss;

4. In holding that petitioner sustained a loss in 1935 on its relinquishment or extinguishment of the common stock of California Consumers Company;

5. In holding that no part of petitioner's original basis for the common stock may be included as

any part of its [140] retained basis for the stock of the new company.

6. In holding that the note of California Consumers Company was not a "security" within the meaning of section 112(b)(3) of the Revenue Act of 1934 and section 112(1) of the Internal Revenue Code as added by section 121 of the Revenue Act of 1943;

7. In holding that the exchange of the note of the California Consumers Company for stock in the new company was not exempt from the recognition of gain or loss under said section 112(1) of the Internal Revenue Code;

8. In holding that the amount of stock and securities of the California Consumers Corporation received by the parties to the reorganization under section 77B (including petitioner) was not substantially in proportion to their respective interest in the insolvent company prior to the exchange; and

9. In that its decision is not supported by the evidence and is contrary to law.

Wherefore, your petitioner petitions that the decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for [141] the Ninth Circuit; that a transcript of record be prepared in accordance with the law and with the rules of said court and be transmitted to the clerk of said court for filing and that

appropriate action be taken, to the end that the errors complained of may be reviewed by said court.

FELIX T. SMITH,
SIGVALD NIELSON,
GRANVILLE S. BORDEN,
SCOTT C. LAMBERT,

Attorneys for Petitioner on
Review.

[Endorsed]: T.C.U.S. Filed July 20, 1945. [142]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Joseph D. Nunan, Jr., Commissioner of Internal Revenue, Washington, D. C.:

You are hereby notified Pacific Public Service Company did on the 20th day of July, 1945, file with the clerk of the Tax Court of the United States in Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision of the Tax Court heretofore rendered in the above entitled cause. A copy of the petitions on review and the assignments of error as filed is hereto attached and served upon you [143] dated July 20, 1945.

(s) FELIX T. SMITH,
(s) SIGVALD NIELSON,
(s) GRANVILLE S. BORDEN,
(s) SCOTT C. LAMBERT,

Attorneys for Petitioner on
Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 20th day of July, 1945.

(s) J. P. WENCHEL,
Attorney for Respondent on
Review.

[Endorsed]: T.C.U.S. Filed July 20, 1945. [144]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

Comes now petitioner on review and makes this concise statement of points on which it intends to rely on the review herein, to wit:

The Tax Court of the United States erred:

1. In holding that the transaction by which petitioner received stock and bonds of California Consumers Corporation in a 77B reorganization in exchange for stock, bonds and a note of a predecessor company, California Consumers Company did not come within the scope of section 112 (b) (5) of the Revenue Act of 1934;

2. In holding that the exchange of the note of the California Consumers Company for stock of the new company did not fall within the provisions of section 112 (b) (3);

3. In separating a single unified transaction, i. e., [145] said plan of reorganization in 1935, into four separate exchanges, certain of which were held to be tax free and others of which were held subject to the recognition of gain or loss;

4. In holding that petitioner sustained a loss in 1935 on its relinquishment or extinguishment of the common stock of California Consumers Company;

5. In holding that no part of petitioner's original basis for the common stock may be included as any part of its retained basis for the stock of the new company.

6. In holding that the note of California Consumers Company was not a "security" within the meaning of section 112 (b) (3) of the Revenue Act of 1934 and section 112 (1) of the Internal Revenue Code as added by section 121 of the Revenue Act of 1943;

7. In holding that the exchange of the note of the California Consumers Company for stock in the new company was not exempt from the recognition of gain or loss under said section 112 (1) of the Internal Revenue Code;

8. In holding that the amount of stock and securities of the California Consumers Corporation received by the parties to the reorganization under section 77B (including petitioner) was not substantially in proportion to their respective interests

in the insolvent company prior to the exchange; and [146]

9. In that its decision is not supported by the evidence and is contrary to law.

Wherefore, your petitioner petitions that the decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of record be prepared in accordance with the law and with the rules of said court and be transmitted to the clerk of said court for filing and that appropriate action be taken, to the end that the errors complained of may be reviewed by said court.

FELIX T. SMITH

SIGVALD NIELSON

GRANVILLE S. BORDEN

SCOTT C. LAMBERT

Attorneys for Petitioner on
Review

Service of a copy of the above statement of points is acknowledged this 20th day of September 1945.

J. P. WENCHEL, Sly

Chief Counsel, Bureau of Internal Revenue

[Endorsed]: T. C. U. S. Filed Sept. 20, 1945. [147]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORDS,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies, duly certified as correct, of the following documents and records in the above entitled cause, in connection with the petition for review by the said Circuit Court of Appeals, Ninth Circuit, heretofore filed by the Pacific Public Service Company:

1. Docket entries.

2. Pleadings:

(a) Petition, including Exhibit "A" attached thereto, which is a copy of the notice of [148] deficiency.

(b) Answer to petition.

(c) Motion for leave to file [first] amendment to petition.

(d) [First] Amendment to petition.

(d-1) Answer to [First] Amendment to petition.

(e) Motion [by Respondent for leave to amend the answer to the petition by striking subparagraph (B) (9) (c) of paragraph 5 of the answer and substituting therefore the amendment attached thereto.]

(f) Amendment to answer to petition.

(g) Motion to reopen record for admission of

evidence material since the enactment of the Revenue Act of 1943.

(h) Motion for leave to file [second] amendment to petition.

(i) [Second] Amendment to petition.

(j) Answer to [second] amendment to petition.

3. Stipulation of facts (and exhibit 1-a designated in Paragraph 5 below).

4. Transcript of hearing.

5. Exhibit 1-A, plan of reorganization of California Consumers Company (attached to Stipulation of Facts).

6. Respondent's Exhibit A, copy of complaint filed in Superior Court of California against Pacific Public Service Company alleging the illegal [149] declaration and payment of dividends by California Consumers Company.

7. Petitioner's Exhibit 2, certified copy of stipulation indefinitely extending time to bring dividend suit to trial.

8. Supplemental stipulation of facts.

9. The opinion and decision of the Tax Court.

10. The petition for review and assignments of error.

11. The notice of filing the petition for review.

12. The statement of points.

13. The designation of portions of the record to be printed.

14. This designation.

FELIX T. SMITH
SIGVALD NIELSON
GRANVILLE S. BORDEN
SCOTT C. LAMBERT

Attorneys for Petitioner on
Review

Service of a copy of the above Designation of Portions of Records, Proceedings and Evidence to be Contained in Record on Review is acknowledged this 20th day of September, 1945, and agreed to.

J. P. WENCHEL, Sly,
Chief Counsel, Bureau of In-
ternal Revenue

[Endorsed]: T. C. U. S. Filed Sept. 20,
1945. [150]

The Tax Court of the United States
Washington

Docket No. 2159

PACIFIC PUBLIC SERVICE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing

pages, 1 to 150, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 21st day of September, 1945.

(Seal)

B. D. GAMBLE

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11146. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Public Service Company, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed September 24, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

T. C. Docket No. 2159

PACIFIC PUBLIC SERVICE COMPANY,
Petitioner on Review,
vs.

JOSEPH D. NUNAN, JR., Commissioner of Internal Revenue,
Respondent on Review.

DESIGNATION OF PORTIONS OF THE
RECORD TO BE PRINTED

Comes now the petitioner on review herein and, complying with the rules of this court pertaining to the designation of the portions of the record to be printed, states that it relies upon the entire record, certified by the Clerk of the Tax Court of the United States to this court, and directs that said record, so certified, be printed as directed on review.

Respectfully submitted,

FELIX T. SMITH

SIGVALD NIELSON

GRANVILLE S. BORDEN

SCOTT C. LAMBERT

Attorneys for Petitioner on
Review

Service of a copy of the above Designation acknowledged this 19th day of September, 1945.

SAMUEL O. CLARK, Jr.

Assistant Attorney General

[Endorsed]: Filed September 19, 1945. Paul P. O'Brien, Clerk.

No. 11,146

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC PUBLIC SERVICE COMPANY,	}
VS.	
COMMISSIONER OF INTERNAL REVENUE,	
	<i>Petitioner,</i>
	<i>Respondent.</i>

PETITIONER'S OPENING BRIEF.

FELIX T. SMITH,
SIGVALD NIELSON,
GRANVILLE S. BORDEN,
SCOTT C. LAMBERT,

Standard Oil Building, San Francisco 4,

Attorneys for Petitioner.

FILED

JAN - 8 1946

PAUL P. O'BRIEN,
CLERK

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC PUBLIC SERVICE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

This is a proceeding upon petition to review a decision of the Tax Court of the United States.

Petitioner filed its income tax return for the calendar year 1940 with the Collector of Internal Revenue at San Francisco.¹ On March 26, 1943, in compliance with Section 272 (a) of the Internal Revenue Code, respondent issued notice of his determination of a deficiency in income tax of petitioner for the calendar year of 1940 in the sum of \$7,343.21 and sent to the petitioner by registered mail a notice of said deficiency.² Petitioner filed its petition for review³ of that determination by the Tax

¹R. pp. 5, 26.

²R. pp. 5, 26.

³R. pp. 1, 5-16.

Court of the United States and therein alleged that there was no deficiency and alleged an overpayment of \$30,488.15. Respondent filed its answer,⁴ the matter was heard by the Tax Court and on April 20, 1945, the Court entered its decision, pursuant to its opinion,⁵ determining an overpayment by the petitioner in the amount of \$117.82.

On July 20, 1945, petitioner filed its petition for review of that decision by this Court and served notice thereof upon respondent in accordance with the provisions of Sections 1141 and 1142 of the Internal Revenue Code, and Rule 30 of this court.

STATEMENT OF THE CASE.

One issue is involved in this case. Was petitioner's unsecured note of the California Consumers Company for the face amount of \$478,270 a "security" within the meaning of Section 112 (b) (3) of the Revenue Act of 1934 and Section 112 (1) of the Internal Revenue Code?

The facts are briefly as follows:

Petitioner was the owner of \$75,000 principal amount of first mortgage bonds,⁶ 902 shares of preferred stock,⁷ and 25,000 shares of common stock⁸ of California Consumers Company, a Delaware corporation, engaged in the ice and cold storage business in Southern California. In addition petitioner held an unsecured promissory note evi-

⁴R. pp. 1, 26-30.

⁵4 T.C. 87.

⁶R. p. 48.

⁷R. p. 48.

⁸R. pp. 47, 48.

dencing advances of \$478,270 to said California Consumers Company.⁹ In 1933 said California Consumers Company defaulted on its first mortgage bonds.¹⁰ A complaint was filed for the foreclosure of its properties and the appointment of a receiver under the trust indenture securing the bonds. A receiver was appointed to operate the properties pending institution of proceedings under Section 77-B of the Federal Bankruptcy Act.¹¹ The receiver operated the properties from 1933 to 1935.¹²

In 1935 a reorganization plan was formulated and proposed by committees representing the bondholders, the preferred shareholders, and the petitioner as unsecured creditor.¹³ This plan was approved by the bankruptcy court and was duly consummated,¹⁴ through proceedings instituted under Section 77-B of the Bankruptcy Act. As provided in the plan of reorganization a new corporation, the California Consumers Corporation, was organized under the laws of California and to it were transferred all the properties of California Consumers Company for its stock and bonds and the assumption of certain liabilities of subsidiaries and affiliated companies.¹⁵ The new corporation issued new 5% bonds in the same aggregate amount as the 6% bonds outstanding and 54,274 shares of new stock to the bondholders, shareholders, and unsecured creditor (petitioner) in the following proportions: 52% of the new shares were issued to the bondholders

⁹R. p. 48.

¹⁰R. p. 47.

¹¹R. p. 47.

¹²R. p. 47.

¹³R. p. 45.

¹⁴R. p. 45.

¹⁵R. p. 45.

represented by participating certificates issued under the voting trust agreement, 42% were issued direct to the preferred shareholders and 6% to petitioner as unsecured creditor.¹⁶ The common shareholder received nothing under the plan of reorganization.¹⁷ In accordance with the plan petitioner received \$75,000 in new bonds plus voting trust certificates for 600 shares of stock of the new company in exchange for its \$75,000 of bonds of the old company, 1,353 shares of stock of the new company in exchange for its 902 shares of preferred stock in the old company and 3,287.5 shares of the new company in exchange for its unsecured note for \$478,270.¹⁸ No parties received any cash, warrants, or other consideration except bonds and stock of the new company.¹⁹ No one other than the former bondholders, preferred stockholders, and petitioner as unsecured creditor received any interest in the new company.

Petitioner retained its stock and bonds in the new corporation until 1940 when they were sold on the open market for a price of \$19,654.85.²⁰ Petitioner claims a loss of \$564,494.56 on that sale.²¹

Respondent determined that the 1935 reorganization was not a tax-free exchange and that a loss should have been recognized to petitioner on the exchange in 1935 when

¹⁶R. pp. 45-46, 59, 60.

¹⁷R. pp. 46, 62-63.

¹⁸R. p. 50.

¹⁹R. p. 46.

²⁰R. pp. 44, 149.

²¹Petitioner's loss was determined as follows:

Cost of bonds.....	\$ 54,877.66	Total cost	\$584,149.41
Cost of preferred stock	51,001.75	Sales price 1940...	19,654.85
Cost of note	478,270.00	Loss sustained	\$564,494.56

584,149.41

it acquired the stock and bonds of California Consumers Corporation in exchange for its stock and bonds and the note of the California Consumers Company.²² Petitioner contended before the court below that there was a tax-free exchange in 1935 and that its basis for determining the loss on the sale in 1940 was its cost of the stock and bonds of California Consumers Company plus its cash advances to said company.²³

The court below held that petitioner's exchange of bonds and preferred stock for new bonds and new stock of the California Consumers Corporation was a tax-free exchange within the scope of Section 112 (b) (3) and Section 112 (1) of the Internal Revenue Code²⁴ and that petitioner sustained no loss in 1935 on said exchange.²⁵ Therefore petitioner's basis for said bonds and stock carried over to the new bonds and stock²⁶ sold in 1940 and resulted in a loss which gave rise to the overpayment of \$117.82 as determined by the Tax Court.

The court below also determined that petitioner's exchange of its demand note for stock of the new corporation was not a tax-free exchange because the demand note could not be claimed as a "security" within the meaning of Section 112 (b) (3) or Section 112 (1) of the Internal Revenue Code.²⁷ If said exchange were tax-free, peti-

²²R. p. 23.

²³R. p. 157.

²⁴Section 112 (1) of the code was added by Section 121 (b) of the Revenue Act of 1943 and was made retroactive to years beginning after December 31, 1931 by subsection (e) thereof.

²⁵R. pp. 161, 163.

²⁶Section 113 (a) (6) of the Internal Revenue Code as amended by Section 121 (c) of the Revenue Act of 1943.

²⁷R. pp. 161-163.

tioner's basis for the new bonds and stock sold in 1940 would have included the amount of the demand note and increased petitioner's loss, giving rise to an overpayment of \$30,488.15 claimed by petitioner in the court below.

SPECIFICATION OF ERRORS RELIED UPON.

Petitioner relies upon the following assignments of error:

The Tax Court of the United States erred:

1. In holding that the exchange by petitioner of the note of California Consumers Company for stock of the new California Consumers Corporation did not fall within the provisions of Section 112 (b) (3) of the Revenue Act of 1934;

2. In separating a single unified transaction, i.e., the 77-B reorganization of California Consumers Company in 1935 into four separate exchanges, certain of which were held to be tax-free and others of which were held subject to the recognition of gain or loss;

3. In holding that the note of California Consumers Company was not a "security" within the meaning of Section 112 (b) (3) of the Revenue Act of 1934 and Section 112 (1) of the Internal Revenue Code as added by Section 121 of the Revenue Act of 1943;

4. In holding that the exchange of the note of California Consumers Company for stock in the new company was not exempt from the recognition of gain

or loss under said Section 112 (l) of the Internal Revenue Code;

5. In that its decision is not supported by the evidence and is contrary to law.

SUMMARY OF ARGUMENT.

1. In an insolvency reorganization as contemplated by Section 121 of the Revenue Act of 1943, which added Section 112 (b) (10) to the Internal Revenue Code, no gain or loss is recognized under Section 112 (l) to any of the participating creditors of the insolvent corporation who receive in exchange for their original creditor-interests proprietary interests in the new corporation.

2. The term "securities" when referring to interests surrendered in an exchange described in Section 112 (b) (3) of the Revenue Act of 1934 or Section 112 (l) of the Internal Revenue Code does not have the same restrictive definition applied by the court in the *Pinellas*²⁸ case.

²⁸*Pinellas Ice Co. v. Commissioner* (1933), 287 U.S. 462.

1. NO LOSS WAS RECOGNIZED TO PETITIONER IN RESPECT OF ITS DEMAND NOTE FOR THE REASON THAT IN AN INSOLVENCY REORGANIZATION AS CONTEMPLATED BY SECTION 112 (l) OF THE INTERNAL REVENUE CODE, NO GAIN OR LOSS IS RECOGNIZED TO ANY OF THE PARTICIPATING CREDITORS OF THE INSOLVENT CORPORATION WHO RECEIVE IN EXCHANGE FOR THEIR ORIGINAL CREDITOR INTERESTS PROPRIETARY INTERESTS IN THE NEW CORPORATION.

The court below correctly determined that the 77-B reorganization of California Consumers Company in 1935 was a tax-free reorganization whether within the provisions of Section 112 (g) of the Revenue Act of 1934 or under the more recently enacted Section 112 (b) (10) of the Internal Revenue Code.

The court below also correctly determined that the exchange of preferred stock and bonds of the old company for stock and bonds of the new company was a tax-free exchange within the scope of the new Section 112 (l), as added by the 1943 Revenue Act.²⁹

The lower court erred in holding that the unsecured note of the insolvent company was not a "security" within the meaning of Section 112 (l),³⁰ for the following reasons:

(a) Under Section 112 (l) no gain or loss is recognized to a creditor who succeeds to a proprietary interest in the new corporation under an insolvency reorganization.

(b) The rules applicable to "voluntary" reorganizations have no application under Section 112 (l).

²⁹R. p. 163.

³⁰R. p. 163.

(c) The decision of the court below is in conflict with the result in another decision of the court below involving Section 112 (1).

(a) Under Section 112 (1) no gain or loss is recognized to a creditor who succeeds to a proprietary interest in the new corporation under an insolvency reorganization.

Section 112 (1) provides:

“(1) General rule.—No gain or loss shall be recognized upon an exchange consisting of the relinquishment or extinguishment of stock or securities in a corporation the plan of reorganization of which is approved by the Court in a proceeding described in subsection (b) (10), in consideration of the acquisition solely of stock or securities in a corporation organized or made use of to effectuate such plan of reorganization.”

The lower court was satisfied that all the conditions for the application of Section 112 (1) were present provided the petitioner exchanged “stock or securities”.³¹ In holding that the unsecured note was not a “security” within the meaning of Section 112 (1), the court below has misconstrued the intention of Congress in its enactment of Section 121 of the Revenue Act of 1943 and in particular the portion thereof which added Section 112 (1) to the Internal Revenue Code. The new legislation was inspired³² by the decisions in *Helvering v. Alabama*

³¹R. p. 164.

³²Senate Finance Comm. Rept., 78th Cong., 1st Session, Rept. 627, pp. 49, 50.

Asphaltic Limestone Co.,³³ and its companion cases.³⁴ These cases all dealt with insolvency reorganizations under which creditors of the insolvent corporation acquired stock or securities of the new acquiring corporation. The Supreme Court laid down certain principles: When creditors take steps to enforce demands against an insolvent debtor they shift their interest from that of creditors to that of equitable owners of the corporate property, and from that time the former creditors have effective command over the disposition of the property. The proprietorship is not disrupted by the reorganization exchanges.

The clear intent of Section 121 of the Revenue Act of 1943 as it may be gleaned from the Congressional Committee Reports is that creditors of an insolvent corporation which undergoes a reorganization under Section 77-B of the National Bankruptcy Act who receive proprietary interests in the newly organized corporation in exchange for their creditor interests in the old shall recognize neither gain nor loss from the reorganization exchange.

Section 121 of the 1943 Revenue Act was first proposed to be added to the new law by the Senate. The Finance Committee Report³⁵ is replete with language indicating the intention of the Senate to cover situations exactly like the one presented by this case. In describing that portion of the amendment relating to the gain or

³³315 U.S. 179.

³⁴*Palm Springs Corp. v. Comm'r.*, 315 U.S. 185; *Bondholders Committee v. Comm'r.*, 315 U.S. 189; *Helvering v. Southwest Corp.*, 315 U.S. 194; see also *Helvering v. Cement Investors*, 316 U.S. 527.

³⁵Senate Finance Comm., 78th Cong., 1st Sess., Rept. 627, p. 49 (Cum. Bull.—1944, p. 1010).

loss to the security holders under a transaction as covered by the new section, the Senate Committee said (p. 52):

“Subsection (1) provides for the recognition of gain or loss upon an exchange of stock, securities, *or other obligations* of the old corporation for stock or securities in the new corporation. In order to provide uniform treatment in all cases regardless of the form of the particular transaction, the section provides that the acquisition of stock or securities in the new corporation and the relinquishment or extinguishment in connection therewith of stock, securities, *or other obligations* in the old corporation shall be deemed to be an exchange for the purposes of the subsection” (*italics supplied*).³⁶

Clearly it was contemplated by Congress that situations would arise, such as presented here, where stock or securities and other obligations of the old corporation would be relinquished or extinguished in exchange solely for stock or securities in the new corporation. The purpose of the new provision would be thwarted if bondholders only are to have the benefit of the new provisions, while noteholders or persons subordinate to the bondholders in point of lien are to be denied the benefits of the section. Under the rules of the *Alabama Asphaltic Limestone* and *Cement Investors* cases, all the creditors of the insolvent corporation by virtue of the insolvency proceedings acquire equity interests. The purpose of the new law is to provide uniform treatment for all obligations of the type found here and to provide for nonrecognition of gain or loss to the creditors and shareholders of the corporation without restriction as to the particular form or term of

³⁶Cum. Bull.—1944, pp. 1011-1012.

the creditors' interest in the insolvent corporation. For example, the Conference Committee Report says:

"The new subsection provides for the nonrecognition of gain or loss to participating shareholders and *creditors* in a reorganization described in new section 112 (b) (10)" (italics supplied).³⁷

Mindful of the basic requirement in tax-free reorganizations that there be a continuity of interest in the same persons before and after the exchange, the Senate Finance Committee expressly noted that the Supreme Court had held that:

"upon an insolvency reorganization, where creditors of the reorganizing corporation succeed to the equity interests in the corporation, *the test of continuity of interest is sufficiently met* so that if the transaction otherwise falls within the definition of reorganization provided in section 112 (g)(1) * * * the transaction is one with respect to which *no gain or loss is to be recognized* * * *"³⁸ (italics supplied).

Congress, however, indicated its desire to enlarge the scope of the tax-free provision beyond those reorganizations contemplated by the Supreme Court by providing that:

"The definition of 'reorganization' contained in section 112 (g)(1) of the code is specifically made inapplicable to a reorganization covered by the provisions on the new section 112 (b)(10)."³⁹

³⁷Conference Comm., 78th Cong., 1st Sess., H.R. Rept. 1079, p. 10 (Cum. Bull.—1944, p. 1065).

³⁸Senate Finance Comm., 78th Cong., 1st Sess., Rept. 627, pp. 49-50 (Cum. Bull.—1944, p. 1010).

³⁹Conference Comm., 78th Cong., 1st Sess., H.R. Rept. 1079, p. 9 (Cum. Bull.—1944, p. 1063).

There is nothing in the new legislation or the committee reports to indicate that creditors of the old corporation who receive a proprietary interest in the new corporation by reason of the insolvency reorganization must hold creditor interests of a particular type in order to enjoy the non-recognition provision. It is significant that in the *Alabama Asphaltic Limestone* case the creditors held stock and *unsecured* notes. It was solely by virtue of their ownership of the unsecured notes that the creditors became the stockholders of the new corporation whose proprietary ownership dated back to the bankruptcy receivership proceedings. Under the interpretation by the court below of the new Section 112 (1), which section was inspired by the *Alabama Asphaltic Limestone* case, gain or loss would have been recognized to the creditors in the *Alabama Asphaltic Limestone* case.

Thus the form of the creditor's claim against the old corporation is unimportant so long as by virtue of the insolvency reorganization he acquires a proprietary interest in the new corporation. In other words, where creditor interests, of whatever form, succeed to proprietary interests in the new corporation "it conforms to realities to date their equity ownership from the time when they invoked the processes of the law to enforce their rights of full priority".⁴⁰ It conforms as well to realities to treat such an equity interest as arose from petitioner's note as a "security" for the purpose of the new Section 112 (1).

⁴⁰*Helvering v. Alabama Asphaltic Limestone Co.*, 315 U.S. 179.

(b) The rules applicable to "voluntary reorganizations" have no application under Section 112 (l).

The court below cites *Bunker Hill & Sullivan Mining, Etc. Co.*⁴¹ and *Commissioner v. Sisto F. Corp.* (2d C. C. A.),⁴² for the proposition that the petitioner's note "was not of sufficient dignity to be considered a security".⁴³ Those cases involved *voluntary* reorganizations where there had not been an intervention by a court of equity. It is well settled that until a court of equity intervenes, the stockholders and creditors are not the owners of the corporate assets, notwithstanding the insolvency of the corporation. *Hollins v. Brierfield Coal & Iron Co.*⁴⁴ In *Helvering v. Cement Investors*,⁴⁵ the court specifically pointed out that ownership of the equity in the debtor companies effectively passes to the creditors when they institute receivership proceedings.

In the *Sisto* case the transferor exchanged notes in the X corporation for stock in the Y corporation to which the X corporation had transferred all of its assets in a *voluntary* reorganization. The Circuit Court for the Second Circuit concluded that the exchange was not tax-free, citing the *Pinellas* case for the proposition that the demand notes were not securities.

The *Sisto* case is no parallel to the case at bar. In the absence of the intervention of a court of equity, there was no continuity of interest between the taxpayer's status as noteholder of the old company and as stockholder in the

⁴¹1 T.C. 1057, 1074.

⁴²139 F. (2d) 253.

⁴³R. p. 161.

⁴⁴150 U.S. 371, 382, 383.

⁴⁵316 U.S. 527.

new company. As noteholder he held no proprietary interest prior to the exchange, as petitioner did here.

The Tax Court followed the decision in the *Sisto* case in the *Bunker Hill & Sullivan* case. In the latter case a debtor corporation transferred its assets, also in *voluntary* reorganization, to a new corporation in exchange for stock and distributed the stock in liquidation to its creditors and stockholders. The petitioner in addition to its stock held a demand note for advances to the old corporation and in the reorganization it received stock of the new corporation for its old stock although none was received in exchange for the note.⁴⁶

The Tax Court held, citing the *Sisto* case, that petitioner in respect of the demand note was simply a creditor with no proprietary interest in the debtor corporation and that it therefore realized a bad debt on the note. The Tax Court also made it clear⁴⁷ that the rationale of the *Cement Investors* case and other cases involved in 77-B proceedings is inapplicable to voluntary reorganizations such as was involved in the *Bunker Hill & Sullivan* case.

(c) The decision of the court below is in conflict with the result in another decision of that court involving Section 112 (1).

The attention of the court is invited to one of the very few cases interpreting and applying the new Section 112(1), *Lothrop Withington*,⁴⁸ and one precisely in point here. In that case Section 112 (1) was held to apply where

⁴⁶1 T.C. 1057, 1059.

⁴⁷1 T.C. 1057, 1076, 1077.

⁴⁸Tax Court Decision, May 30, 1944, C.C.H. Dec. 13,966(M).

under a 77-B reorganization exchange in 1935 the petitioner exchanged second mortgage bonds, preferred stock and *notes* of the old corporation for common stock in the new corporation. Petitioner sold his common stock in 1939. The Tax Court held that under the new Section 112 (1) petitioner's basis for the common stock was his original cost for the bonds, preferred stock and *notes*.

2. THE RESTRICTIVE DEFINITION OF A "SECURITY" DERIVED FROM THE PINELLAS CASE HAS NO APPLICATION TO A SITUATION WHERE A CREDITOR INTEREST IS EXCHANGED FOR A PROPRIETARY INTEREST IN THE NEW CORPORATION.

The court below relied upon *Pinellas Ice Co. v. Commissioner*⁴⁹ in holding that petitioner's demand note was not a "security" within the meaning of Section 112 (b)(3) of the Revenue Act of 1934.⁵⁰ That section reads as follows:

"No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."⁵¹

The *Pinellas* case involved the transfer of its assets by the Pinellas Company to the Citizens Company for cash and short-term notes and the question which ultimately went to the Supreme Court was whether the Pinellas

⁴⁹287 U.S. 462.

⁵⁰R. p. 162. Apparently that court's holding that the demand note was not a "security" within the meaning of Section 112 (1) was similarly grounded.

⁵¹Section 112 (b) (3) of the Internal Revenue Code is the same.

Company was taxable on the gain realized on the transaction, or whether the transaction qualified as a tax-free reorganization. The Supreme Court in holding that the transaction was nothing but a sale for cash and short-term notes and therefore did not qualify as a reorganization, introduced the "continuity of interest" theory as a test to eliminate those transactions which had "no real semblance to a merger or consolidation"⁵² and to avoid a construction "which would make evasion of taxation very easy".⁵³ The court also held somewhat unnecessarily (and, in view of subsequent developments, somewhat unfortunately) that the notes were not "securities" within the meaning of Section 203 (b)(3) of the Revenue Act of 1926.⁵⁴ From this holding has emanated the misconception now seen in many decisions that in no case can notes qualify as "securities" for the purpose of the reorganization section.⁵⁵

Generally, the decisions following the *Pinellas* case have concerned themselves with what was issued to the recipient by the "reorganized" corporation. The courts have taken literally the statement by the court in the *Pinellas* case that to enjoy an exemption from the recognition of gain, "the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of short-term purchase-money notes".⁵⁶ As if the term "security" depended upon the length of time between the inception and the maturity of the obligation,

⁵²287 U.S. 462, 470.

⁵³*Pinellas Ice Co. v. Commissioner*, 287 U.S. 462, 469.

⁵⁴This section is identical with Section 112 (b)(3) of the 1934 Act and the Internal Revenue Code.

⁵⁵Sec. 112 (g).

⁵⁶287 U.S. 462, 470.

the courts applied in various ways the test of length of time. *L. & E. Stirn, Inc. v. Commissioner*;⁵⁷ *Commissioner v. Freund*;⁵⁸ *Burnham v. Commissioner*.⁵⁹ This tendency to measure legal sufficiency on a time basis came before the Supreme Court in *LeTulle v. Scofield* (1940).⁶⁰ That case involved an exchange of properties by one corporation for cash and 10 year serial bonds of the transferee corporation. There the court took note of that tendency and in a sweeping opinion declared that the term of the obligation is not material and applied instead as a test whether after the reorganization the transferor *retained* a proprietary interest in the enterprise or *became* simply a creditor. If the interest *acquired* was that of a creditor the transaction did not constitute a reorganization.

The Supreme Court thus affirmed the "continuity of interest" principle after reviewing its development in the years subsequent to the *Pinellas* decision. It seems to be well settled by the *LeTulle* decision that in determining whether rights received pursuant to a reorganization constitute a "security" the test is whether they give the recipient a continuing interest in the enterprise different from that of a general creditor. Thus it became clear that any creditor interest received whether represented by notes or bonds and whether of short or long term is insufficient to meet the "continuity of interest" requirement.

It is petitioner's contention that there is a clear distinction between notes *given up* in an exchange for stock

⁵⁷107 F. (2d) 390.

⁵⁸98 F. (2d) 201.

⁵⁹86 F. (2d) 776.

⁶⁰308 U.S. 415.

and notes *received* upon an exchange. It is the latter situation to which the *Pinellas* and *LeTulle* cases apply. The basis of their application is not that the notes are not “securities” but that they are not such “securities” as to fulfill the continuity of interest requirement.

This distinction was clearly perceived by the Circuit Court for the Seventh Circuit in *Burnham v. Commissioner of Internal Revenue*⁶¹ involving a note *given up* in an exchange for stock. The court distinguished the *Pinellas* case and *Cortland Specialty Co.*⁶² case when it held the exchange tax-free saying of those cases (p. 777): “It is obvious that both courts based their decisions not so much on the ground that the short-term purchase money notes were not securities as that the transactions involved were not reorganizations.”

The seriousness of the misapplication of the *Pinellas* rule is most pointed where creditor reorganizations are involved. In virtually all of such reorganizations one side of the exchange is represented by creditor interests of one sort or another—bonds, notes, or other obligations. The holders of such interests generally receive stock and other securities in the reorganized or new corporation. To hold under the *Pinellas* or *LeTulle* cases that creditor interests on the transferor side of the exchange preclude the transaction from qualifying as tax free is in direct defiance of the Supreme Court’s decision in the *Alabama Asphaltic Limestone* case.⁶³ As we have seen above that case held

⁶¹86 F. (2d) 776; cert. denied 300 U.S. 683.

⁶²*Cortland Specialty Co. v. Commissioner of Internal Rev.* (2d C.C.A., 1932), 60 F. (2d) 937; certiorari denied 288 U.S. 599.

⁶³*Supra* pp. 9-10.

that upon an insolvency reorganization where creditors of the reorganizing corporation succeed to the equity interests in the corporation the test of continuity of interest is sufficiently met so that if the transaction otherwise falls within the definition of reorganization provided in Section 112 (g)(1), the transaction is one with respect to which no gain or loss is to be recognized.

Yet the lower court here lapsed into that error when it disregarded completely that petitioner's creditor interest survived in stock of California Consumers Corporation and ruled out the exchange on the ground that petitioner's note was not a "security" on the authority of the *Pinellas* case.

The same error was committed by the Circuit Court of Appeals for the Third Circuit in *Neville Coke & Chemical Co. v. Commissioner of Internal Revenue*⁶⁴ and by the Circuit Court of Appeals for the Second Circuit in *Bedford v. Commissioner of Internal Revenue*⁶⁵ both of which were decided this year. In both cases notes of the insolvent corporation were exchanged for stock of the new corporation in 77-B reorganizations. Yet both courts concluded that the notes were not "securities" under the totally inappropriate test of the *Pinellas* case and completely ignored the fact that in both cases the creditor interests had acquired by virtue of the bankruptcy proceedings a proprietary status for their creditor interests. In short, the courts in the two cited cases disregarded the important conclusion of the

⁶⁴148 F. (2d) 599.

⁶⁵150 F. (2d) 341.

Supreme Court in the *Alabama Asphaltic Limestone* case while applying the artificial one sentence dictum of the *Pinellas* case.

If this position is correct then bonds which are simply creditor interests under the *LeTulle* case and hence are not "securities" when received in an exchange cannot be "securities" when given up in an exchange. The court below held otherwise.

This tendency of the courts to misapply the *Pinellas* case provoked a thoughtful article by Professor Erwin Griswold of the Harvard Law School in the Harvard Law Review for May, 1945. Petitioner respectfully invites the court's attention to this article which urges a re-examination of the concept "securities" inherited from the *Pinellas* case when the term is applied to notes or other creditor interests surrendered in an insolvency reorganization.⁶⁶ Professor Griswold sets forth the theory, previously put to the lower court by petitioner, but perhaps not so well stated:

"It is herein argued, however, that the continuity of interest requirement should be concerned solely with what is received on the exchange, and not at all with what is given up. On this basis, it would follow that all creditors' reorganizations meet the continuity of interest test when the creditors end up as stockholders, regardless of whether the creditors were note holders or bondholders, or creditors on open account, and regardless of whether bankruptcy or receivership proceedings have actually been commenced."

⁶⁶Such a re-examination was frustrated when certiorari was denied in the *Neville Coke & Chemical* case, presumably because there is as yet no conflict with the 2nd and 3rd Circuits on the point raised by Professor Griswold and this petitioner.

Petitioner submits that this case is governed by the principle and holding of the *Alabama Asphaltic Limestone* case. In that case the Supreme Court examined the facts in the light of the rule of the *Pinellas* case—not the pseudo “notes are not securities” rule but the real rule, the “continuity of interest” test—and expressly found a continuity of interest in the unsecured noteholder who in the insolvency reorganization exchanged his note for stock in the new corporation. The continuity of interest was found to exist because the bankruptcy proceedings gave the noteholder a proprietary interest in the old corporation which carried over into stock of the new.

Mindful also of its own ruling in the *LeTulle* case that bondholder interests received in an exchange were creditor interests only and did not satisfy the “continuity of interest” requirement the court said in the *Alabama Asphaltic Limestone* case:

“That conclusion involves no conflict with the principle of the *LeTulle* case. A bondholder interest in a solvent company plainly is not the equivalent of a proprietary interest, even though upon default the bondholders could retake the property transferred. The mere possibility of a proprietary interest is, of course, not its equivalent. But the determinative and controlling factors of the debtor’s insolvency and an effective command by the creditors over the property were absent in the *LeTulle* case.”⁶⁷

Thus the Supreme Court itself has ruled that the *Pinellas* and *LeTulle* cases can have no application to a

⁶⁷315 U.S. 179, 184.

situation where creditor interests which have acquired a proprietary status through the bankruptcy proceedings are exchanged for stock in the new corporation.

To summarize, the Supreme Court has recognized in the *Alabama Asphaltic Limestone* case and its companion cases (supra pp. 9-10, 19-20) that when bankruptcy proceedings are instituted, creditors thereby acquire by virtue of their creditor status proprietary interests in the insolvent corporation since "they are the real parties in interest".⁶⁸ It therefore becomes important to determine whether such proprietary interest is continued in the new corporation. Where stock of the new corporation is received for such creditor interest in the old, there would seem to be no question that a tax-free exchange has taken place.

Dated, San Francisco,
January 9, 1946.

Respectfully submitted,
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⁶⁸Cement Investors, Inc., supra pp. 10 (f. 34), 11.

No. 11146

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**PACIFIC PUBLIC SERVICE COMPANY, A CORPORATION,
PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

SEWALL KEY,

Acting Assistant Attorney General.

J. LOUIS MONARCH,

LEE JACKSON,

Special Assistants to the Attorney General.

FILED

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11146

PACIFIC PUBLIC SERVICE COMPANY, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court's findings of fact and opinion (R. 148-164) are reported at 4 T. C. 742.

JURISDICTION

The petition for review (R. 166-175) involves an alleged overpayment of federal income tax for the year 1940 in the amount of \$30,488.15. On March 26, 1943, the Commissioner of Internal Revenue mailed to the taxpayer a notice of a deficiency in the amount of \$7,343.21 of income taxes for the year 1940. (R. 17-25.) Within ninety days thereafter and on June 17, 1943, the taxpayer filed a petition with the Tax

Court, under the provisions of Sections 272 and 322 of the Internal Revenue Code, for a redetermination of that deficiency, and for a further determination that the taxpayer had overpaid \$30,488.15 income taxes for that year, for which claim for refund was alleged to have been filed (R. 1, 5-17). On April 20, 1945, the Tax Court entered its decision determining an overpayment of \$117.82 (R. 165). The petition for review of such decision was filed on July 20, 1945 (R. 166-172) pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

In 1940 taxpayer sold shares of stock which it had obtained in 1935 in exchange for an unsecured demand note pursuant to a plan of reorganization of taxpayer's debtor under Section 77B of the Bankruptcy Act. The question is whether the taxpayer's basis for the shares of stock sold in 1940 is the same as the taxpayer's basis for the demand note. The answer to this question depends up whether the demand note was a "security" within the meaning of Section 112 (b) (3) of the Revenue Act of 1934, or within the meaning of Section 112 (1) as added to the Internal Revenue Code by Section 121 (b) of the Revenue Act of 1943, and deemed to be included in the revenue laws applicable to taxable years beginning after December 31, 1931, by Section 121 (e) of the Revenue Act of 1943.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*.

STATEMENT

The facts as stipulated (R. 43-88, 147), and as found by the Tax Court (R. 149-157) may be summarized as follows:

The taxpayer is a corporation organized under the laws of California. (R. 149.) In 1940 the taxpayer sold in an arm's-length transaction all of its bonds and shares of stock in California Consumer Corporation (hereinafter referred to as the new company) for amounts aggregating \$19,654.85. (R. 149.) These bonds and shares of stock had been acquired by the taxpayer in 1935 in exchanges for bonds, preferred stock and an unsecured demand note of California Consumers Company (hereinafter referred to as the old company), pursuant to a plan of reorganization of the old company under Section 77B of the Federal Bankruptcy Act, whereby the new company, organized for that purpose, acquired substantially all the assets of the old company. (R. 151-154.)

The parties who prior to the plan held bonds, stock, and the note of the old company, received pursuant to the plan the following interests in the new company (R. 153):

<i>Holding in old company</i>	<i>Interest in new company received</i>
\$3,496,500 principal amount of bonds (of which \$75,000 principal amount was held by taxpayer).	\$3,496,500 principal amount of bonds and 27,872 participating certificates for 27,972 shares of stock.
\$15,343 shares no par value preferred stock (of which 902 shares were held by taxpayer).	23,014.5 shares.
\$478,270 unsecured demand note (held by taxpayer).	3,278.5 shares.
25,000 shares common stock (held by taxpayer).	Nothing.
Total -----	\$3,496,500 bonds; 54,274 shares.

By reason of its respective holdings of bonds and stock and the note of the old company, taxpayer, as a result of the consummation of the plan, received the following (R. 154):

<i>Holding in old company</i>	<i>Interest in new company received</i>
\$75,000 principal amount of bonds—	\$75,000 principal amount of bonds with participating certificates for 600 shares of common stock held by voting trustees.
902 shares preferred stock—	1,353 shares of common stock.
\$478,270 note-unsecured—	3,287.5 shares of common stock.
25,000 shares common stock—	Nothing.

The plan also provided for the dismissal, with prejudice to all parties plaintiff, of a dividend suit filed December 29, 1933, in the Superior Court of California against taxpayer, seeking the recovery of the amount of certain dividends alleged to have been illegally declared and paid on both preferred and common stock of the old company, in the sum of approximately \$1,000,000. (R. 156.)

Taxpayer has never claimed any portion of the unsecured indebtedness of the old company as partially or wholly worthless in any of its income tax returns, nor has taxpayer received any tax benefit through bad debt deductions with respect thereto. No part of taxpayer's cost of preferred stock and bonds of the old company or of its common stock and bonds of the new company has been claimed or allowed as a deduction or otherwise in any tax return filed by taxpayer prior to 1940. (R. 156-157.)

Taxpayer reported a net loss on its federal income tax returns for 1933, 1934, and 1935, and no tax has been paid by taxpayer for those years. (R. 157.)

In its tax return for 1940 the taxpayer reported losses totalling \$92,524.23 on the sale of the bonds and

stock of the new company. In computing these losses, the taxpayer used as a basis for the bonds and stock which were acquired in exchange for the bonds of the old company its basis for the old bonds, and it likewise carried forward its basis for the preferred stock of the old company to the shares of stock of the new company received therefor in the 1935 exchange. As a basis, however, for the 3,287.5 shares of new stock received in exchange for the demand note of \$478,270, the taxpayer used a value of \$1.90 per share. (R. 149-150, 151-152.)

The Commissioner ruled that none of the exceptions in the Revenue Act of 1934 to the recognition of gain or loss on the 1935 exchange applied and hence that the taxpayer was not entitled to carry forward its old bases to the new bonds and stock. (R. 23.)

In the Tax Court, the taxpayer, in addition to contending (1) that the basis of the old bonds carried over and became the basis for the new bonds and common stock received therefor, and (2) that the basis of the old preferred stock became the basis for the new common stock received therefor, also contended (3) that its basis for the demand note of the old company should carry over to the new shares of common stock received therefor, and further contended (4) that its basis of \$6,000 for the common stock of the old company, which was extinguished in the 1935 exchanges, should be included in its basis for the bonds and stock of the new company. (R. 6, 8-14, 40-41.)¹

¹ Taxpayer also claimed an additional deduction of \$873.40 for capital stock tax, but this point was conceded by the Commissioner. (R. 149.)

The Tax Court sustained taxpayer's contentions (1) and (2) above, and rejected contentions (3) and (4). (R. 160-161, 163-164.)

The Commissioner has not appealed from the parts of the decision below adverse to him. The taxpayer urges error only with respect to contention (3) above. (Br. 2, 6-7.)

SUMMARY OF ARGUMENT

1. The term "stock or securities" as used in Section 112 (b) (3) of the Revenue Act of 1934 does not include an unsecured demand note.

The term has appeared in provisions of the revenue laws relating to the recognition of gain or loss on exchanges of property for more than twenty-five years and for the past twelve years the courts have consistently construed the term as not embracing short-term or demand notes. Congress is aware of the construction which the courts have placed upon the term, and the legislative history of other provisions of the revenue laws indicates that Congress intended the term to be thus restricted.

2. The legislative history of Section 112 (1), added to the Internal Revenue Code by Section 121 (b) of the Revenue Act of 1943 and a similar provision made applicable to earlier Revenue Acts, shows that the term "stock or securities" used in that new subsection was intended to have the same restricted meaning that the term has as used elsewhere in Section 112. When Congress has used the term "stock or securities" in a broader sense than that attributed to

it in Section 112, it has specifically defined and broadened the term.

3. Recent decisions of the Supreme Court involving reorganization of insolvent corporations are distinguishable from the present case.

4. Under the Tax Court's holding that the unsecured demand note was not a "security" within the meaning of subsections (b) (3) or (1) of Section 112, it was unnecessary for the Tax Court to pass upon the question whether the basis of the note should in any event be reduced by virtue of the dismissal, pursuant to the plan of reorganization, of the dividend suit against the taxpayer in the state court. The Commissioner contended below and contends here that the dismissal of this suit was part of the consideration passing to the taxpayer for the surrender of the demand note. If this Court should disagree with the holding of the Tax Court that the note was not a "security" within the meaning of the statutory sections here involved, the case should be remanded to the Tax Court for further proceedings.

ARGUMENT

I

Preliminary discussion

The sole question in the present petition for review is with respect to the taxpayer's basis for computing loss on 3,287.5 shares of stock of California Consumers Corporation sold by taxpayer in 1940. These shares were acquired by taxpayer in 1935 in ex-

change for an unsecured demand note in the amount of \$478,270 of California Consumers Company, pursuant to a plan of reorganization of the latter company under Section 77B of the Bankruptcy Act.

The taxpayer's contentions are that the transaction in 1935, whereby it acquired the shares of stock sold in 1940, comes within the provisions of Section 112 (b) (3) of the Revenue Act of 1934 (Appendix, *infra*), or within the provisions of Section 112 (1) as added to the Internal Revenue Code by Section 121 (b) of the Revenue Act of 1943 (Appendix, *infra*), and as deemed to be included in the revenue laws applicable to taxable years beginning after December 31, 1931, by Section 121 (e) of the Revenue Act of 1943, and accordingly that the basis of the shares sold in 1940 shall be the same as the basis of the demand note which was exchanged for these shares.²

The Tax Court held that the unsecured demand note unchanged for the shares of the new company was not a "security" within the meaning of either Section 112 (b) (3) or Section 112 (1), and hence that neither section applied. (R. 161-164.)³ These sections will be discussed below.

² See Sections 111 (a), 113 (b) and (a) (16) of the Internal Revenue Code (Appendix, *infra*); Section 113 (a) (6) of the Revenue Act of 1934 (Appendix, *infra*); and Section 121 (c) (1) and (e) of the Revenue Act of 1943 (Appendix, *infra*).

³ The Tax Court did not pass upon the Commissioner's ruling that the taxpayer did not receive the bonds and stocks of the new company pursuant to a reorganization within the meaning of Section 112 (g) of the Revenue Act of 1934, as amended. (R. 23, 161, 164.) Section 121 (d) (4) of the Revenue Act of 1943 (Appendix, *infra*) amended Section 112 (g) of the Internal Revenue Code, defining "reorganization" as used in Section 112, so as to

II

The unsecured demand note was not a "security" within the meaning of Section 112 (b) (3)

Section 112 (b) (3) of the Revenue Act of 1934 provides:

No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.⁴

The meaning of the term "securities" in provisions of the Revenue Acts relating to the recognition of gain or loss has been frequently litigated. One of the early pronouncements on the question was by the

make the definition inapplicable to the new Section 112 (b) (10) and the new Section 112 (1). The definition of reorganization in Section 112 (g) is, however, still applicable to Section 112 (b) (3), unqualified by anything in the new Section 112 (b) (10) and (1). The Commissioner contends that there was no reorganization within the meaning of Section 112 (g) and hence that Section 112 (b) (3) will also for that reason not apply to the present case. But since the Commissioner does not contest the Tax Court's holding (R. 164) that there was a plan of reorganization within the meaning of Section 112 (1) and does not contend that the phrase "stock or securities" is used in any different sense in Section 112 (1) than in Section 112 (b) (3), the case may be decided by determining that the unsecured demand note is or is not a "security" within the meaning of Section 112 (1).

⁴ Since at least 1918, Revenue Acts have contained the phrase "stock or securities" in provisions relating to recognition of gain or loss. Section 202 (b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, and Revenue Act of 1921, c. 136, 42 Stat. 227; Section 203 (b), Revenue Act of 1924, c. 234, 43 Stat. 253, and Revenue Act of 1926, c. 27, 44 Stat. 9; and Section 112 of subsequent Revenue Acts and the Internal Revenue Code.

Supreme Court in 1933 in *Pinellas Ice Co. v. Commissioner*, 287 U. S. 462. There, as one of the grounds of its decision, the Court held that short-term purchase money notes, payable within four months, were not securities within the intendment of the Revenue Act.

The Circuit Courts of Appeals have uniformly followed this decision of the Supreme Court as holding that short-term or demand obligations do not constitute "securities" within the meaning of Section 112 or its antecedents. *L. & E. Stirn, Inc. v. Commissioner*, 107 F. 2d 390 (C. C. A. 2d); *Lloyd-Smith v. Commissioner*, 116 F. 2d 642 (C. C. A. 2d); *Commissioner v. Sisto F. Corp.*, 139 F. 2d 253 (C. C. A. 2d).

Where a taxpayer has argued, as does the taxpayer here (Br. 16-23), that the *Pinellas* case, *supra*, involved notes which were received upon an exchange and that the rule of that case should not be applied to notes given up on an exchange, the courts have pointed out that the phrase "stock or securities" appears twice in Section 112 (b) (3), once to refer to what a party turns in to a corporation being reorganized and then to refer to what the recipient takes from the reorganized company, and have stated that there is no reason for thinking that the phrase has a different meaning in the two instances. *Neville Coke & Chemical Co. v. Commissioner*, 148 F. 2d 599 (C. C. A. 3d), certiorari denied, October 8, 1945; *Bedford v. Commissioner*, 150 F. 2d 341 (C. C. A. 2d).

It will be noted that all except one of the Circuit Courts of Appeals decisions cited above are subsequent to the decision of the Supreme Court in *LeTulle*

v. *Scofield*, 308 U. S. 415, cited by the taxpayer. (Br. 18.) The denial by the Supreme Court of the petition for certiorari in *Neville Coke & Chemical Co. v. Commissioner*, *supra*, indicates that those two decisions were not deemed to conflict.

The case of *Burnham v. Commissioner*, 86 F. 2d 776 (C. C. A. 7th), cited by the taxpayer (Br. 19), involved ten-year notes, only two years of which had expired. The court did not express disagreement with the view that short-term notes are not securities within the meaning of Section 112 (b) or its antecedent Section 203 (b), but rested its decision primarily on the fact that the notes there involved were for a long term.

No case is cited by the taxpayer holding that demand or short-term notes are securities within the meaning of Section 112 (b) or similar provisions of earlier acts. What the taxpayer really seeks is a reexamination of the decision of the Supreme Court in the *Pinellas* case, *supra*. That case was decided more than twelve years ago and the phrase "stock or securities" has been in Section 112 and its counterpart in earlier statutes for more than twenty-five years. Congress, we submit, is well aware of the construction which the courts have placed upon that phrase, and, as will be pointed out hereinafter, would doubtless have amended or defined the phrase if the decisions of the courts had not correctly interpreted the meaning of Congress.

III

The unsecured demand note was not a "security" within the meaning of Section 112 (1)

Section 112 (1) as added to the Internal Revenue Code by Section 121 (b) of the Revenue Act of 1943

(Appendix, *infra*), and as deemed to be included in revenue laws applicable to taxable years beginning after December 31, 1931, provides in part as follows:

(1) *General Rule*.—No gain or loss shall be recognized upon an exchange consisting of the relinquishment or extinguishment of stock or securities in a corporation the plan of reorganization of which is approved by the court in a proceeding described in subsection (b) (10), in consideration of the acquisition solely of stock or securities in a corporation organized or made use of to effectuate such plan of reorganization.⁵

1. The taxpayer argues in effect (Br. 9-13) that there should be read into the above-quoted section, after the words "stock or securities", the words "or other obligations", and that the section thus embraces the claims of all creditors of a corporation which undergoes a reorganization under Section 77B of the Bankruptcy Act.

In support of this contention, the taxpayer stresses (Br. 11) the words "or other obligations" in the report of the Senate Finance Committee which accompanied the Revenue Bill of 1943. The taxpayer has failed to note, however, that that language relates to the Revenue Bill of 1943 as it was *reported to the Senate*. The bill, as it was reported to the Senate, contained in the proposed new Section 112 (1), the words "stock, securities, or other obligations of the corpora-

⁵ The Tax Court held (R. 164) that the exchange here involved was made to effectuate a plan of reorganization approved by a court in a proceeding described in subsection (b) (10), and the Commissioner does not contest this holding.

tion whose property is transferred.”⁶ In the Senate the entire proposed new Section 112 (1) was deleted from H. R. 3687, 78th Cong., 1st Sess., without explanation,⁷ and in the bill passed by the Senate on January 21, 1944, no such provision as Section 112 (1) appears.

In the Conference Committee numerous amendments were made to H. R. 3687 as it had passed the Senate, and under the conference amendments a new subsection (1) was added to Section 112 of the Internal Revenue Code as it now appears. It is true that the Conference Committee Report contains the word “creditors” in the sentence quoted by the taxpayer (Br. 12), but this language is followed by the sentence—

Section 112 (1) provides that no gain or loss shall be recognized upon the exchange of stock or securities of the old corporation solely for stock or securities in the new corporation,

and an illustration is then given involving bondholders.⁸

The legislative history of Section 112 (1), instead of supporting taxpayer’s contentions, leads, we believe, to the contrary conclusion, namely, that Congress, by

⁶ See Section 115 (b) of H. R. 3687, 78th Cong., 1st Sess., as reported to the Senate on December 21, 1943, by Mr. George of the Committee on Finance.

⁷ This was accomplished by the so-called Johnson amendment. Senator George opposed the Johnson amendment because, among other things, it omitted the provision dealing with gain or loss to the security holder. 90 Cong. Record, Part 1, pp. 190-193.

⁸ H. Rep. No. 1079, 78th Cong., 2d Sess., pp. 47-48 (1944 Cum. Bull. 1059).

eliminating the words "or other obligations" intended that the section should not embrace all types of creditors' claims or obligations. Also it cannot be doubted that the committees were cognizant of the Supreme Court case of *Pinellas Ice Co. v. Commissioner, supra*, for both the report of the Committee on Finance and the Conference Report refer to court decisions which cite the *Pinellas* case. If the holding of that case that short-term notes are not securities within the intentment of Section 203 (b) (or its successor Section 112 (b)) was not intended to be applied to the new subsection 112 (1), it is difficult to believe that the words "or other obligations," which had been in the bill, would not have been left in the law as finally enacted.

Indeed, it seems clear that Congress intended the phrase "stock or securities" as used in the new subsection (1) of Section 112 to have the same meaning as used elsewhere in Section 112 of the Code, for in Section 1 (c) of the Revenue Act of 1943 (Appendix, *infra*), it is provided that, except as otherwise expressly provided, terms used in that Act shall have the same meaning as when used in the Internal Revenue Code. This is further emphasized by the provision of Section 121 (d) (4) of the Revenue Act of 1943, which specifically excepts the new subsections (b) (10) and (1) of Section 112 from the definition of "reorganization" contained in Section 112 (g) of the Code.

A further indication of the Congressional intent is found in the treatment of the phrase "stock or securities" in another section of the Internal Revenue Code. In Supplement R of the Internal Revenue Code relat-

ing to exchanges and distributions, in obedience to orders of the Securities and Exchange Commission, the phrase "stock or securities" is used. Congress desired, however, that, as used in that supplement, the term should have a broader meaning than the term as used in Section 112, and accordingly in Section 373 (f) of the Internal Revenue Code the term was defined, for purposes of that supplement only, as meaning—

shares of stock in any corporation, certificates of stock or interest in any corporation, notes, bonds, debentures, and evidences of indebtedness (including any evidence of an interest in or right to subscribe to or purchase any of the foregoing).

However, that supplement also contains in Section 373 (d) (3) a new term, namely, "nonexempt property", which, as used in that supplement, is defined as meaning, among other things—

Short-term obligations (including notes, drafts, bills of exchange, and bankers' acceptances) having a maturity at the time of issuance of not exceeding twenty-four months, exclusive of days of grace.

The provision of Section 373 quoted above and the other provisions of Supplement R appeared first in the Revenue Act of 1938, c. 289, 52 Stat. 447. In discussing the definition of "stock or securities" therein contained, the Senate Committee on Finance stated (S. Rep. No. 1567, 75th Cong., 3d Sess., p. 36 (1939-1 Cum. Bull. (Part 2) 779, 805)):

In order to facilitate exchanges or distributions in furtherance of the policies of section 11 (b) of the Public Utility Holding Company Act of 1935, the term "stock or securities" is given a broader meaning in section 373 (f) than it possesses in connection with the reorganization provisions of section 112.

We think it clear that if Congress had intended the phrase "stock or securities", as used in new subsection (1) added to Section 112 by the 1943 Act, to have an enlarged meaning or a different meaning from the term as used elsewhere in Section 112, it would have specifically so provided, as it did in Supplement R, with respect to the term as used in that Supplement.

The Tax Court was clearly correct, we submit, in holding that the unsecured demand note which taxpayer exchanged in 1935 for the stock sold in 1940 was not a "security" within the meaning of either Section 112 (b) (3) or Section 112 (1), and accordingly that the basis of the note did not carry over and become the basis of the stock.

2. This conclusion does not conflict with either *Helvering v. Limestone Co.*, 315 U. S. 179, or *Helvering v. Cement Investors*, 316 U. S. 527. The former case involved a question of basis of the assets in the hands of the new corporation, and the latter involved bondholders and an exchange of property under Section 112 (b) (5) of the Revenue Act of 1936. In those cases the old companies were insolvent, and the Supreme Court based its decisions on the ground that in the insolvency proceedings the stockholders were excluded and the creditors stepped into the shoes

of such stockholders and acquired the equity ownership of the property of the old corporations. Such a theory could not be applied to the present case, as well pointed out by the Tax Court. (R. 158-160.)

3. The decision of the Tax Court in the present case does not conflict with its decision in *Withington v. Commissioner*, decided May 30, 1944 (1944 P-H Tax Court Memorandum Decisions, par. 44,183). In that case the Tax Court does state that the taxpayer held Bay State Road notes, but it further states that none of these notes are directly involved therein, as the case is presented. It seems clear from the opinion that the Tax Court was concerned only with the stocks and bonds there involved.

IV

If this court should uphold the taxpayer's contention that the unsecured demand note is a "Security" within the meaning of subsections (b) (3) or (1) of section 112, the case should be remanded to the tax court for further proceedings

In view of its decision that the unsecured demand note was not a "security" within the meaning of either subsection (b) (3) or subsection (1) of Section 112 and accordingly that neither section permitted the carry-over of taxpayer's old basis, it was unnecessary for the Tax Court to pass upon the effect of that provision of the plan of reorganization which provided (R. 156) for the dismissal, with prejudice to all parties plaintiff, of a dividend suit filed in the Superior Court of California, against taxpayer, seeking the recovery of the amount of certain dividends alleged to have been illegally declared and paid on both preferred

and common stock of the old company, in the sum of approximately \$1,000,000.

It was the contention of the Commissioner below (R. 104-105, 109-110, 113, 114-115) and it contends here that the dismissal of this suit was part of the consideration accruing to the taxpayer for the surrender of the unsecured demand note of the old company in 1935.

Both subsection (b) (3) and subsection (1) of Section 112 relate to exchanges of stock or securities *solely* for stock or security. It is undeniable that the dismissal of the suit against taxpayer was neither stock nor securities. Cf. *United States v. Hendler*, 303 U. S. 564.

Section 113 (a) (6) of the Revenue Act of 1934, as amended (Appendix, *infra*) provides for an adjustment to or allocation of the basis of the property exchanged where the property acquired upon the exchange consists in part of the type of property permitted to be received without the recognition of gain or loss and in part of other property.

Hence, if this Court should uphold the taxpayer's contention that the exchange in 1935 was within the provisions of subsection (b) (3) or (1) of Section 112, there should nevertheless be an adjustment in the basis of the old demand note, and the case should be remanded to the Tax Court for further proceedings to that end.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed. If the decision is reversed, the case should be remanded to the Tax Court for further proceedings.

Respectfully submitted.

SEWALL KEY,

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Special Assistants to the Attorney General.

FEBRUARY 1946.

APPENDIX

Internal Revenue Code:

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * *

(26 U. S. C., 1940 ed., Sec. 111.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * *

(16) *Basis established by Revenue Act of 1934.*—If the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1936, and the basis thereof, for the purposes of the Revenue Act of 1934 was prescribed by section 113 (a) (6), (7), or (8) of such Act, then for the purposes of this chapter the basis shall be the same as the basis therein prescribed in the Revenue Act of 1934.

* * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as herein provided.

(1) *General Rule*.—Proper adjustment in respect of the property shall in all cases be made—

(A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, * * *

(26 U. S. C. 1940 ed., Sec. 113.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule*.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind*.—

* * * * *

(2) *Stock for stock of same corporation*.—No gain or loss shall be recognized if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(3) *Stock for stock on reorganization*.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities party to the reorganization.

(4) *Same—Gain of corporation*.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(1) [as added by Section 121 (b) and (e), Revenue Act of 1943] *Exchanges by Security Holders in Connection With Certain Corporate Reorganizations*.—

(1) *General rule*.—No gain or loss shall be recognized upon an exchange consisting of the relinquishment or extinguishment of stock or

securities in a corporation the plan of reorganization of which is approved by the court in a proceeding described in subsection (b) (10), in consideration of the acquisition solely of stock or securities in a corporation organized or made use of to effectuate such plan of reorganization.

(2) *Exchange occurring in taxable years beginning prior to January 1, 1943.*—If the exchange occurred in a taxable year of the person acquiring such stock or securities beginning prior to January 1, 1943, then, under regulations prescribed by the Commissioner with the approval of the Secretary, gain or loss shall be recognized or not recognized—

(A) to the extent that it was recognized or not recognized in the final determination of the tax of such person for such taxable year, if such tax was finally determined prior to the ninetieth day after the date of the enactment of the Revenue Act of 1943; or

(B) in cases to which subparagraph (A) is not applicable, to the extent that it would be recognized or not recognized under the latest treatment of such exchange by such person prior to December 15, 1943, in connection with his tax liability for such taxable year.”

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(6) [as amended by Section 213 (i), Revenue Act of 1939, c. 247, 53 Stat. 862, and by Section 121 (c) (1) and (e), Revenue Act of 1943, *supra*] *Tax-free exchanges generally.*—If the property was acquired, after February 28, 1913, upon an exchange described in section 112 (b) to (e), inclusive, or section 112 (1), the basis

shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112 (b) or section 112 (1) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. Where as part of the consideration to the taxpayer another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this paragraph, be considered as money received by the taxpayer upon the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

* * * * *

Sec. 112. (5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is

substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(10) [as added by Section 121 (a) and (e), Revenue Act of 1943 *supra*] *Gain or loss not recognized on reorganization of corporations in certain receivership and bankruptcy proceedings.*—No gain or loss shall be recognized if property of a corporation (other than a railroad corporation, as defined in section 77m of the National Bankruptcy Act, as amended) is transferred, in a taxable year of such corporation beginning after December 31, 1933, in pursuance of an order of the court having jurisdiction of such corporation—

(A) in a receivership, foreclosure, or similar proceeding, or

(B) in a proceeding under section 77B or Chapter X of the National Bankruptcy Act, as amended,

to another corporation organized or made use of to effectuate a plan of reorganization approved by the court in such proceeding, in exchange solely for stock or securities in such other corporation.

* * * * *

(g) [as amended by Sec. 121 (d) (4) and (e) of the Revenue Act of 1943, *supra*] *Definition of Reorganization.*—As used in this section “(other than subsection (b) (10) and subsection (1)) and in section 113 (other than subsection (a) (22))—

(1) The term “reorganization” means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) a transfer by a corporation

of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

(h) *Definition of Control*.—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

* * * * *

Revenue Act of 1943, c. 63, 58 Stat. 26:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) * * *

(b) *Act Amendatory of Internal Revenue Code*.—Except as otherwise expressly provided, wherever in this Act an amendment is expressed in terms of an amendment to a chapter, subchapter, title, supplement, section, subsection, subdivision, paragraph, subparagraph, or clause, the reference shall be considered to be made to a provision of the Internal Revenue Code.

(c) *Meaning of Terms Used*.—Except as otherwise expressly provided, terms used in this Act shall have the same meaning as when used in the Internal Revenue Code.

SEC. 121. REORGANIZATION OF CERTAIN INSOLVENT CORPORATIONS.

(a) *Nonrecognition of Gain or Loss on Certain Reorganizations*.—Section 112 (b) (relating to recognition of gain or loss upon certain

exchanges) is amended by inserting at the end thereof the following:

“(10) *Gain or loss not recognized on reorganization of corporations in certain receivership and bankruptcy proceedings.*—No gain or loss shall be recognized if property of a corporation (other than a railroad corporation, as defined in section 77m of the National Bankruptcy Act, as amended) is transferred, in a taxable year of such corporation beginning after December 31, 1933, in pursuance of an order of the court having jurisdiction of such corporation—

“(A) in a receivership, foreclosure, or similar proceeding, or

“(B) in a proceeding under section 77B or Chapter X of the National Bankruptcy Act, as amended,

to another corporation or made use of to effectuate a plan of reorganization approved by the court in such proceeding, in exchange solely for stock or securities in such other corporation.”

(b) *Recognition of Gain or Loss of Security Holders in Connection With Certain Corporate Reorganizations.*—Section 112 (relating to recognition of gain or loss) is amended by inserting at the end thereof the following:

“(1) *Exchanges by security holders in connection with certain corporate reorganizations.*—

“(1) *General rule.*—No gain or loss shall be recognized upon an exchange consisting of the relinquishment or extinguishment of stock or securities in a corporation the plan of reorganization of which is approved by the court in a proceeding described in subsection (b) (10), in consideration of the acquisition solely of stock or securities in a corporation organized or made use of to effectuate such plan of reorganization.

“(2) *Exchange occurring in taxable years beginning prior to January 1, 1943.*—If the exchange occurred in a taxable year of the per-

son acquiring such stock or securities beginning prior to January 1, 1943, then, under regulations prescribed by the Commissioner with the approval of the Secretary, gain or loss shall be recognized or not recognized—

“(A) to the extent that it was recognized or not recognized in the final determination of the tax of such person for such taxable year, if such tax was finally determined prior to the ninetyeth day after the date of the enactment of the Revenue Act of 1943; or

“(B) in cases to which subparagraph (A) is not applicable, to the extent that it would be recognized or not recognized under the latest treatment of such exchange by such person prior to December 15, 1943, in connection with his tax liability for such taxable year.”

(c) *Basis*.—Section 113 (a) (relating to basis of property) is amended—

(1) by inserting after “112 (b) to (e), inclusive,” in paragraph (6) the following: “or section 112 (1),”;

(2) by inserting after “property permitted by section 112 (b)” in paragraph (6) the following: “or section 112 (1)”; and

(3) by inserting after paragraph (21) the following: * * *

(d) *Technical Amendments*.—

(1) Section 112 (c) (relating to gain from exchanges not solely in kind) is amended by inserting after “(b) (I), (2), (3), or (5)”, the following: “, or within the provisions of subsection (1),”, and by inserting after “paragraph” the following: “or by subsection (1)”.

(2) Section 112 (d) (relating to gain of corporation) is amended by inserting after “subsection (b) (4)” the following: “or (10)”.

(3) Section 112 (e) (relating to loss from exchanges not solely in kind) is amended by inserting after “subsection (b) (I) to (5), inclusive,” the following: “or (10), or within the provisions of subsection (1),”.

(4) So much of section 112 (g) (defining "reorganization") as precedes paragraph (I) is amended to read as follows:

"(g) *Definition of Reorganization.*—As used in this section (other than subsection (b) (10) and subsection (1)) and in section 113 (other than subsection (a) (22))—".

(5) Section 112 (k) (relating to assumption of liability) is amended by striking out "subsection (b) (4) or (5)" wherever appearing therein and inserting in lieu thereof the following: "subsection (b) (4), (5), or (10)".

(6) Section 718 (a) (6) (A) is amended by striking out "112 (b) (3), (4), or (5), or so much of section 112 (c), (d), or (e) as refers to section 112 (b) (3), (4), or (5)" and inserting in lieu thereof "112 (b) (3), (4), (5), or (10), or so much of section 112 (c), (d), or (e) as refers to section 112 (b) (3), (4), (5), or (10)".

(e) *Effective Date.*—Provisions having the effect of the amendments made by subsection (a), subsection (c) (3), and subsection (d) (2), (3), (4), (5), and (6), shall be deemed to be included in the revenue laws respectively applicable to taxable years beginning after December 31, 1933, but shall not affect any tax liability for any taxable year beginning prior to January 1, 1943. Provisions having the effect of the amendments made by subsection (b), subsection (c) (I) and (2), and subsection (d) (I), shall be deemed to be included in the revenue laws respectively applicable to taxable years beginning after December 31, 1931.

(26 U. S. C. 1940 ed., Supp. IV, Sec. 112, 113.)

No. 11,146

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PACIFIC PUBLIC SERVICE COMPANY,	}
VS.	
COMMISSIONER OF INTERNAL REVENUE,	
<i>Petitioner,</i>	
<i>Respondent.</i>	

PETITIONER'S REPLY BRIEF.

FELIX T. SMITH,
SIGVALD NIELSON,
GRANVILLE S. BORDEN,
SCOTT C. LAMBERT,

Standard Oil Building, San Francisco 4,
Attorneys for Petitioner.

FILED

MAR 13 1946

PAUL P. O'BRIEN,
CLERK

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No. 11,146

IN THE

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PACIFIC PUBLIC SERVICE COMPANY,	}
<i>Petitioner,</i>	
VS.	
COMMISSIONER OF INTERNAL REVENUE,	
<i>Respondent.</i>	}

PETITIONER'S REPLY BRIEF.

Prior to 1935 petitioner held certain capital obligations of its subsidiary, California Consumers Company. In 1935, under bankruptcy section 77B, the company was reorganized and taken over by California Consumers Corporation. The schedule at the back of this brief shows the securities involved, petitioner's holdings and their cost, the new securities received by petitioner and their basis as determined by the Tax Court in computing petitioner's loss on the subsequent sale of these securities in 1940. On this schedule we have shown in black type the figures regarding Lot B, which is the sole feature of this transaction involved in our appeal. The only question presented by the appeal is whether under the statutes the original basis, petitioner's investment in this note, carries over to the shares received in exchange on reorganization.

The Tax Court held the shares had to take a new valuation. We submit that the old basis should carry over.

Much of respondent's brief is devoted to an attempt to inject into this appeal an entirely different question. Prior to the reorganization, suit was begun against petitioner.¹ On reorganization the suit was dismissed.² Asserting that this presents issues that require further trial in the Tax Court, respondent seeks a remand for that purpose.³ We submit that respondent is not in a position now to raise this question, and, further, that on the merits respondent's point is groundless.

1. THE ORIGINAL COST OF THE SECURITY SHOULD FOLLOW THROUGH THE REORGANIZATION AND BECOME THE BASIS FOR THE SECURITIES ISSUED ON THE EXCHANGE.

This point is fully discussed in our opening brief. Of the authorities touching it, upon which respondent relies, all but one are analyzed in our opening brief. The one new authority mentioned by respondent is the *Lloyd-Smith* case.⁴ Like the two other cases, in connection with which it is cited,⁵ the *Lloyd-Smith* case is essentially different from the case at bar. The note under discussion in this case was a note of the recapitalized company, not of the old company that went into the reorganization, as here. In

¹R. 113-118, 118-145.

²R. 63, 113-119.

³Resp. Br., pp. 4, 7, 17-18.

⁴*Lloyd-Smith v. Commissioner*, 116 F.(2d) 642;
Resp. Br., p. 10.

⁵*L. & E. Stirn, Inc. v. Commissioner*, 107 F.(2d) 390;
Resp. Br., p. 10; Op. Br., p. 18;
Commissioner v. Sisto F. Corp., 139 F.(2d) 253;
Resp. Br., p. 10; Op. Br., pp. 14-15.

this case the note under discussion was not, as here, the note of a subsidiary held by the parent corporation. Respondent's reliance upon this case is based entirely upon a false theory of nominalism. This case reached the conclusion that the note there involved was not a "security" within the meaning of the income tax law. That being true of the interest denominated a note in this case, respondent concludes that in no case can an interest, denominated a note, be included under the term "security". Respondent's theory is not even good nominalism. In the instant case the bonds, both of the old and new companies, are treated as "securities". These "bonds", however, were nothing but "promissory notes". No legal distinction exists between a "bond" and a "note". The true basis of all the decisions is realistic, rather than nominalistic. The court considers in each case all the circumstances of the relation between the "security" holder and the corporation, in order to determine whether that interest is such a property interest as to come within these income tax provisions.

A circumstance of the greatest importance in the instant case is the fact that petitioner held all the common stock of the old company, as well as holding the note. Under such conditions, common stockholders may not realize upon the indebtedness to the prejudice of others interested in the company.⁶ Interest on such a note is treated as a dividend.⁷

⁶*Taylor v. Standard Gas Co.*, 306 U.S. 307, deferring indebtedness to preferred stock;

Pepper v. Litton, 308 U.S. 295;

Arnold v. Phillips (5th C.C.A., 1941), 117 F.(2d) 497.

⁷*Prudence Securities Corporation v. Commissioner* (2nd C.C.A., 1943), 135 F.(2d) 340.

See also *Arnold v. Phillips*, *supra*.

As pointed out,⁸ the old company was reorganized under the Bankruptcy Act. In such cases the best view is that all creditor interests are securities and must be so treated for income tax purposes. Respondent concedes that this is true where the old company is insolvent, but refers to the decision of the Tax Court.⁹ This seems to be a suggestion that in this case the old company was not insolvent. Respondent cannot really mean this. Insolvency was expressly stipulated¹⁰ and found.¹¹ Respondent valued the securities of the new company on bases that make the total value of the new securities issued on the reorganization \$1,245,667.25¹² against \$3,496,500 bonds and a \$478,270 note. Respondent cannot seriously suggest to this Court that the old company was not insolvent.

Realistically the test whether or not an interest is a security, within the meaning of these reorganization provisions, must be based upon consideration of the extent to which the holder's interests are bound up with those of the company, and, conversely, of the ease with which the holder can obtain his money and divorce himself from the company. Only thus can cases of this kind be brought in line with the spirit of the reorganization provisions.¹³

⁸Op. Br., pp. 8-16.

⁹Resp. Br., pp. 16-17; R. 158-160.

¹⁰R. 46.

¹¹R. 152.

¹²See appended schedule.

¹³"The underlying assumption of the exceptions is that the new property is substantially a continuation of the old investment still unliquidated; and, in the case of reorganization, that the new enterprise, the new corporate structure, and the new property are substantially continuations of the old still unliquidated" (sec. 29.112(a)-1, Treasury Regulations 111, Income Tax, p. 347).

"The reorganization provisions were enacted to free from the imposition of an income tax purely 'paper profits or losses' wherein

Considered from this standpoint, it is quite clear that petitioner could at no time have collected its \$478,270 note, and that, throughout the reorganization, all petitioner's interests in the company were firmly bound up with the interests of the ultimate reorganized company.^{13a}

2. NO FURTHER PROCEEDINGS OR ADJUSTMENTS ARE REQUIRED.

Respondent's effort to reopen the proceedings, so that he may offer evidence ascribing some value to the lawsuit dismissed, comes too late.

(a) Respondent did not plead anything of the kind.

Nothing in respondent's allegations in the Tax Court seeks to ascribe any value to this litigation.

(b) At the trial, respondent offered no evidence that the litigation had any value.

Respondent offered the proceedings in the litigation.¹⁴ No evidence was offered to show either that the dismissal of the litigation had any value or that the charges against petitioner, made in the litigation, had any substance. At

there is no realization of gain or loss in the business sense but merely the recasting of the same interests in a different form, the tax being postponed to a future date when a more tangible gain or loss is realized'' (*Commissioner v. Gilmore's Estate* (3d C.C.A., 1942), 130 F.(2d) 791, 794).

''The recognized purpose and scheme of the reorganization provisions is to omit from tax a change in form and to postpone the tax until there is a change in substance or a realization in money'' (*Morley Cypress Trust* (1944), 3 T. C. 84, 86).

^{13a}The unsecured creditors of the insolvent company other than petitioner were not affected by the plan of reorganization (R. 62).

¹⁴R. 114-117.

the time, the Tax Court pointed this out. "The charge * * * was never adjudicated * * * I don't know what conclusion we can draw from it. Someone makes a charge and that is as far as it goes. * * * It is not anything. I charge that you owe me a million dollars and that is the end of it. It doesn't prove you owe the million dollars. * * *¹⁵ it is sort of like the counsel who asks the witness if he didn't lie, and he says, 'No, I didn't lie'. Then you say, 'Well, maybe he lied'. Somebody makes a charge and they don't pursue it, and I don't see how I can draw any conclusion on that.'¹⁶ Whatever may be said of the nature of respondent's point on the merits, there is no doubt that he was given ample warning of this defect of proof. He did not attempt to supply the defect. He immediately submitted the case.¹⁷ All that respondent is now asking is that he be permitted on remand to supply the defect that he disregarded at the trial. He offers no authority for his proposal that he be accorded this privilege of trying the case piecemeal. He suggests no reason why he did not take advantage of the opportunity afforded in the Tax Court and present at the first trial any evidence he may have on these points.¹⁸

(c) The dismissal was not consideration for the note.

Nothing in the record indicates that the dismissal was part of the consideration for the surrender of the note. The plan of reorganization simply treats each one of these things separately. Respondent states, indeed, its contention "that the dismissal * * * was part of the con-

¹⁵R. 115.

¹⁶R. 117.

¹⁷R. 117.

¹⁸But see *Retzer v. Wood*, 109 U.S. 185, 188.

sideration * * * for the surrender of the * * * note,'¹⁹ and says that was respondent's contention below. There was no evidence in support of such a contention, and respondent does not suggest that such evidence could be available on a retrial.

(d) No property was acquired by the dismissal.

Respondent bases its claim upon section 113 (a) (6). This deals entirely with "property acquired" on an exchange.²⁰ Respondent overlooks the fact that this dismissal did not result in the *acquisition* of any *property* by petitioner. After the dismissal no one could point to any specific thing held by petitioner and say that petitioner acquired that by the dismissal of the litigation. The only authority cited by respondent is *United States v. Hendler*, 303 U. S. 564.²¹ That case was essentially different. On the completion of the reorganization the taxpayer actually had a property right, the obligation of the new company to discharge the taxpayer's bonds. That obligation was a thing of value. The performance of that obligation would enable the taxpayer to remove from its books the liability of those bonds appearing on its books. In the instant case petitioner did not have any liability on its books that could be removed by the dismissal of the litigation. It could not possibly *gain* from the dismissal of the litigation. It acquired no property thereby.

(e) Respondent has not appealed.

Respondent urges that the dismissal of the litigation had something to do with the note held by petitioner,²²

¹⁹Resp. Br., p. 18.

²⁰Resp. Br., pp. 18, 23.

²¹Resp. Br., p. 18.

²²Supra, p. 2.

Lot B in the annexed schedule. The fact is that the litigation dealt with dividends upon the common and preferred stocks of the old company.²³ It was connected, therefore, with the common and preferred stocks, Lots A and C, on that schedule. Certainly it has no connection with the note, Lot B. The Tax Court's ruling on Lot A was adverse to petitioner. Petitioner has not sought to reopen that question here. The Tax Court's ruling on Lot C was in favor of petitioner. By an appeal, respondent could have raised that question here. Respondent did not appeal.

It is respectfully submitted:

1st. That for the 3,287.5 shares of the stock of the new corporation, issued to petitioner in exchange for the promissory note of the old corporation, petitioner is entitled to compute its 1940 loss on the basis of the original cost of the note, \$478,270; and

2nd. That respondent is not entitled to any further proceedings before the Tax Court in an effort to obtain some adjustment of that figure.

Dated, San Francisco,

March 11, 1946.

Respectfully submitted,

FELIX T. SMITH,

SIGVALD NIELSON,

GRANVILLE S. BORDEN,

SCOTT C. LAMBERT,

Attorneys for Petitioner.

²³R. 119-144.

California Consumers Company

	Cost to Petitioner	Total Outstanding	Petitioner's Holding
		25,000 shares common stock ¹	
Lot A	\$ 6,000.00 ¹		25,000 shares common stock ²
		\$478,270 note ³	
Lot B	478,270.00 ²		\$478,270 note ³
		15,343 shares preferred stock ⁴	
Lot C	51,001.75 ³		902 shares preferred stock ⁴
		\$3,496,500 bonds ⁵	
Lot D	54,877.66 ⁴		\$75,000 bonds ⁴
	\$500,149.41		

¹ R. 147, 151.

² R. 47, 48, 57-58, 152.

³ R. 48, 151.

⁴ R. 48, 151-152.

⁵ R. 47-48, 58, 152.

⁶ R. 47, 57-58, 152.

¹ R. 47, 58, 152.

² R. 47, 58, 152.

³ R. 16, 30, 62, 132-134, Resp. Br. pp. 3, 4.

⁴ R. 16, 30, 62, 133-134, Resp. Br. pp. 3, 4.

⁵ R. 40, 60, 153; Resp. Br. p. 3.

⁶ R. 40, 60, 153; Resp. Br. p. 3.

CAPITAL OBLIGATIONS

California Consumers Corporation

	Total Issued	Issued to Petitioner	Basis Determined by Tax Court	Respondent's Valuations Issued to Petitioner	Total Issue
	Nothing ⁸				
		Nothing ⁹			
	3,287.5 shares ¹⁰				\$ 1,643.75 ¹²
	23,014.5 shares ¹¹	3,287.5 shares ¹⁰	\$ 1,643.75 ¹⁰	\$ 1,643.75 ¹²	11,507.25 ¹⁴
		1,353 shares ¹³	\$51,001.75 ¹⁴	676.50 ¹⁵	
	\$3,496,500 bonds ¹²				1,292,516.25 ¹³
	27,972 shares ¹²	\$75,000 bonds ¹⁴			
		600 shares ¹³	\$ 54,877.66 ¹⁴	26,437.50 ¹⁵	
			\$107,523.16	\$28,737.75 ¹⁵	\$1,245,667.25

¹⁰ R. 30, 60, 151; Resp. Br. p. 4.

¹¹ R. 30, 60-61, 151, Resp. Br. p. 4.

¹² As so determined in computation under Rule 50.

¹³ See R. 165.

¹⁴ R. 161, Resp. Br. p. 6.

¹⁵ From last column.

¹⁶ Computed on basis of unit price in last column,
300 a share.

¹⁷ R. 23.

¹⁸ Subtracting above figures from total shown below.

¹⁹ Computed from last column at unit price of \$332.50

for each unit of \$1,000 bond with 8 shares appurtenant.

No. 11151

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE LOGIN CORPORATION, a corporation,
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

NOV 27 1945

PAUL P. O'BRIEN,
CLERK

No. 11151

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern
District of California, Southern Division

No. 23329-R

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff.

vs.

THE LOGIN CORPORATION, a Corporation,
and L. P. GAINSBOROUGH,

Defendants.

AGREED STATEMENT OF CASE

The plaintiff, Price Administrator, in his complaint, annexed hereto, alleged that the defendants sold Cuban Rock Lobster at prices in excess of those permitted by the General Maximum Price Regulation. He asked damages in three times the amount of the alleged overcharge, and an injunction.

The defendants' answer denied the allegation. They demanded a trial by jury as to all issues. The action was ultimately dismissed as to the defendant Gainsborough.

In the course of pretrial conferences the parties entered into the following "Stipulation of Facts" and into the following [1*] stipulation reserving to the defendants the right to submit testimony to show that if any violation occurred it was neither willful nor the result of failure to take practicable precautions:

*Page numbering appearing at foot of page of original certified Transcript of Record.

“In the District Court of the United States,
Northern District of California, Southern Division

No. 23329-R

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

THE LOGIN CORPORATION, a Corporation,
and L. P. GAINSBOROUGH,

Defendants.

STIPULATION OF FACTS

It Is Hereby Stipulated that the following are
the facts in the above entitled action:

The defendant, The Login Corporation, is a California corporation. (It is hereinafter called “Login.”) Its officers are: L. P. Gainsborough, president; W. N. Tomlinson, Vice-president, and E. Nevea, secretary. The principal place of business of the corporation is located at 1012 Bank of America Building, 300 Montgomery Street, San Francisco, California.

Compania Commercial Gainsborough is a Cuban corporation, (it is hereinafter called “the Cuban corporation”). Its principal place of business is located in Havana, Cuba. It is an exporter; not a packer or canner. Its president is Jacques Kartun.

Primarily Login operates by negotiating sales

for others to purchasers secured by Login for which Login is paid a percentage sales commission. It acts in this manner [2] for more than thirty manufacturers or suppliers. At times Login acts as an importer in its own behalf. These occasions generally occur when it wants to introduce to the market a product for which there is no present sales demand. Login in this situation may import and sell a commodity. If a demand is created, Login thereafter accepts orders for submission to foreign suppliers, —Login acting as sales agent only.

In this manner, Login, prior to March, 1942, arranged to import from Cuban canners a quantity of Cuban Lobster to see if it could be successfully introduced in the San Francisco Market. This lobster arrived in March of 1942. Fifty cases were sold by Login at Thirteen and 50/100 Dollars (\$13.50) a case, and because the sales were made in March it established a ceiling price for Login at Thirteen and 50/100 Dollars (\$13.50) on any future sales Login might make in its own behalf as an importer.

A strong demand was created for Cuban Lobster. However, the General Maximum Price Regulation became effective in May of 1942. At this time Login discontinued handling Lobster, despite a great demand for it, for these reasons:

The price of Lobster was rising steadily in Cuba. Because of the high price, and its low ceiling, Login could not have imported, and sold, in its own behalf. When the O.P.A. later specifically exempted selling agents of a foreign seller from the price

regulations, the price of lobster in Cuba had risen so drastically that Login preferred [3] not to handle it even on this basis.

However, during this period importers in San Francisco did import and sell many thousands of cases in response to the demand.

The sales involved in the present action arose in this manner:

In October of 1943, Login, as sales agent, started selling Cuban lobster for the Cuban corporation for export to Hawaii. This lobster was to be routed through Florida and San Francisco. It was necessary to ship a full carload in order to avoid the extremely high "less than carload" rates. Approximately 334 cases were needed to make up the full carload destined for Hawaii.

Login had been under pressure to bring lobster into the San Francisco market. It therefore notified a local food broker that although Login could not import and sell lobster because of its ceiling, if buyers had ceilings that permitted them to do so, and wished to import lobster,—Login could arrange the purchase from its principal in Cuba. The broker was notified that Login could act only as sales agent.

On this basis orders were taken in December, 1943, for 334 cases of lobster through the local broker. This broker, E. L. Roberts & Co., issued a "sales memorandum" to the purchasers showing that he acted as agent for the Cuban corporation. A copy of one of the sales memoranda is attached hereto and marked Exhibit "A."

Login received from the broker Roberts a dupli-

cate sales memorandum and itself issued to the purchaser a confirmation of sale which stated that Login was acting as agent for the Cuban [4] corporation. A correct copy of a confirmation of sale is attached hereto and marked Exhibit "B."

When the taking of the orders was completed, Login as agent issued a confirmation of sale to the Cuban corporation showing the sale of 1250 cases of lobster to "various buyers in San Francisco Bay Area and Hawaii" by Login as agents for the Cuban corporation. A correct copy of this confirmation of sale is attached to the accompanying Exhibits and marked Exhibit "E."

The lobster in question was shipped from Cuba at the direction of the Bank of California to Kenneth Kittelson and other forwarders in Florida. There it was cleared through customs, and the carload was shipped with the knowledge and consent of the Bank of California, consigned as follows: "Consigned to Login Corporation, c/o Haslett Warehouse, 115 Townsend St., San Francisco, California." On arrival the car containing the lobster was shunted onto the spur-track of Haslett Warehouse Company at 115 Townsend Street, and from there deliveries were made to the various buyers from freight car on siding.

The financing of the transaction was as follows: In October of 1943 Login arranged that the Bank of California would issue a letter of credit to the Cuban corporation, authorizing it to draw on the bank at Seventeen and 00/100 Dollars (\$17.00) per case for the entire carload of lobster. The letter of

credit agreement provided that the lobster be consigned to Florida freight forwarders and that drafts on the bank "must be accompanied with invoice, consular invoice and entire set of negotiable 'on board' ocean bills of lading made out to the bank."

The letter of credit agreement under which the credit was opened also provided that Login recognized the Bank's

"* * * ownership in and unqualified right to the possession and disposal of all property shipped under or pursuant to or in connection with the Credit or in any way relative thereto or to the drafts drawn thereunder, whether or not released to any of us on trust or bailee receipt or otherwise, and also in and to all shipping documents, warehouse receipts, policies or certificates of insurance and other documents accompanying or relative to drafts drawn under the Credit, and in and to the proceeds of each and all of the foregoing, until such time as all the obligations and liabilities of us or any of us to you at any time existing under or with reference to the Credit or this agreement, or any other credit or any other obligation or liability to you, have been fully paid and discharged, all as security for such obligations and liabilities; and that all or any of such property and documents, and the proceeds of any thereof, coming into the possession of you or any of your correspondents, may be held and disposed of by you as herein provided; and the receipt by you, or any of your correspondents, at any

time of other security, of whatever nature, including cash, shall not be deemed a waiver of any of your rights or powers herein recognized."

Payments were made against the letter of credit on December 6, 13 and 27, 1943, so that the entire credit thereby established was exhausted on December 27, 1943, and the Cuban corporation paid in accordance with the terms of said letter of credit the \$17.00 per case by that date.

Thereafter, and in the months of February and March, 1944, and with the consent and knowledge of the Bank of California, the shipments were made from the freight forwarders in Florida as aforesaid to said Login Corporation as aforesaid and a bill of lading upon the shipment was issued against said shipment, being P.F.E. car No. 94433, which said bill of lading was delivered to Login Corporation. Upon arrival the lobster was billed to the various buyers at \$23.50 per case by Login on invoices stating: [6]

"* * * The Login Corporation, 300 Montgomery Street, San Francisco, as agents for Cia Commercial Gainsborough Co. S.A. * * *"

Some of the local purchasers made payment at the time they originally gave their order. The balance made payments to Login on receipt of the lobster. Login paid the amounts as received, up to Seventeen Dollars (\$17.00) per case, to the Bank of California, to reimburse it for the amounts that

the Cuban corporation had drawn upon it. The remaining Six and 50/100 Dollars (\$6.50) per case was accounted for by Login who rendered an account sales to the Cuban corporation showing all sales and amounts collected, less freight, insurance, shipping charges, and one per cent charge by Login for guaranteeing the letter of credit. The balance was remitted to the Cuban corporation, less Login's five per cent commission.

The amount realized by Login, as sales agent, on these sales for the Cuban corporation at Twenty-three and 50/100 Dollars (\$23.50) a case was its five per cent commission, or One and 17/100 Dollars (\$1.17) per case.

On the March, 1942, transaction in which Login imported and sold in its own behalf at Thirteen and 50/100 (\$13.50) a case, the amount it realized was Three and 90/100 Dollars (\$3.90) per case, or a profit of nearly thirty-five per cent.

The Office of Price Administration, six months prior to the sales in question here, was informed by Login that it had made sales transactions for the Cuban corporation, as its selling agent, in almost the identical manner set forth in this stipulation. No action was taken by the Office of Price Administration.

This information was given by Login to the Office of Price Administration in the course of an investigation by the Office of Price Administration of pineapple sales made by [7] Login. The information was contained in a sworn statement in writing taken by an O.P.A. representative from the Vice-

President of Login on June 25, 1943. The statement recited similar transactions by Login, in regard to canned pineapple. It recited that Login had originally imported 3,000 cases of canned pineapple and sold it for its own account in March of 1942, at Nine and 25/100 Dollars (\$9.25) per dozen, thus establishing Login's ceiling at Nine and 25/100 Dollars (\$9.25). Thereafter, and subsequent to the General Maximum Price Regulation Login made sales of pineapple only as sales agent for the Cuban corporation. The statement informed the Office of Price Administration that Login was then working on sales, as sales agent, of 20,000 cases at a price of Ten and 15/100 Dollars (\$10.15) per dozen—i.e. a price above Login's own ceiling as an importer in its own behalf.

The Office of Price Administration, after receiving the information contained in said sworn statement, never communicated with Login either to approve or disapprove the method of business disclosed by the statement.

Dated: Dec. 4th, 1944.

GEORGE A. FARADAY,
W. H. BRUNNER,
Attorneys for Plaintiff.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Defendants."

“EXHIBIT A”

Sales Memorandum

Customer's Copy

E. L. Roberts & Co.

Crowe-Roberts Co.

Manufacturer's Representative

260 California Street . San Francisco, 11

No. 3080

Sold To: Schumacher Date Sold Nov. 29, 1943
Brothers Date Ship At once on
701 Battery St. arrival
San Francisco, F. O. B. Haslett Whse.,
Calif. S.F.

For Account of E. L.
Roberts & Co., as agents
for Cia Commercial-
Gainsborough, S.A.

Terms:

How Ship Net

Quantity	Size	Commodity	Price
25 cs.	48½'s	Cuban Bolero Lobster.....	\$23.50

#3947

Subject to Confirmation of Seller. This Is Not an
Invoice. This Memo Becomes Void When Sale
Is Covered by Contract. [9]

“EXHIBIT B”

San Francisco

Our No. 3947 (X240)

Havana

Date 12/2/43

London

Rotterdam

Honolulu

The Login Corporation

Factors

300 Montgomery Street

Phone DOuglas 8780

San Francisco, U. S. A.

To E. L. Roberts & Co.

260 California St., San Francisco 11

as Agents for Cia Comercial-Gainsborough, S.A.

We Confirm the Following Sale:

Buyer Schumacher Brothers, 701 Battery St.,
San Francisco, Calif.F.O.B., F.A.S., C.I.F. Haslett Warehouse,
San Francisco

Terms: Net

Shipment Prompt on arrival

Quantity	Commodity and Specifications	Price Per cs.
25 cs.	48½'s Bolero Brand Cuban Rock	
	Lobster	\$23.50

Accepted:

Schumacher Brothers

/s/ LEROY CRAMER.

S/M 3080

11/29/43

THE LOGIN CORPORATION.

By /s/ W. N. TOMLINSON.

“EXHIBIT E”

San Francisco	Our No. X-240
Havana	Date 10/7/43
London	
Rotterdam	
Honolulu	

The Login Corporation
Factors
300 Montgomery Street
Phone DOuglas 8780
San Francisco, U. S. A.

To Cia Commercial Gainsborough, S.A.
Aguilar 363, Havana, Cuba

We confirm the following sale:

Buyer Various buyers in San Francisco Bay Area
and Hawaii

F.O.B., F.A.S., C.I.F. San Francisco

Terms: \$17.00 per case advance by Letter of
Credit. Balance when remittance received from
buyers

Shipment November

As Agents for Yourselves

Quantity	Commodity and Specifications	Price Per cs.
1250 cs.	481½'s Fancy Cuban Rock Lobster.....	\$23.50

Our commission 5% and 1%

plus bank charges for financing

This Transaction was confirmed by you by Wire
10/7/43.

THE LOGIN CORPORATION.

[Title of District Court and Cause.]

STIPULATION RESERVING TO DEFEND-
ANTS RIGHT TO OFFER FURTHER EVI-
DENCE

It Is Hereby Stipulated that regardless of the stipulation of facts in the above entitled action entered into between the attorneys for the plaintiff and the attorneys for the defendants there is reserved to the defendants the right to submit testimony to show that if there were any violation by the defendants of the Emergency Price Control Act or of any regulation issued thereunder, said violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation, if any occurred.

Dated: December 9, 1944.

GEORGE A. FARADAY,
W. H. BRUNNER,

Attorneys for Plaintiff.

KEESLING & KEIL,
FRANCIS CARROLL,

Attorneys for Defendants.

There is no claim of any violation as to the main portion of the lobster, which went to Hawaii. The lobster involved is the 334 cases which went to San Francisco purchasers. As to this, the principal question was whether or not these were purchases by persons dealing "directly with a foreign seller whose place of business is located outside of the continental United States, or with his selling agent

wherever located" within the meaning of the O.P.A.'s Maximum Import Price Regulation which then provided in paragraph 2 of Article I:

"Purchases from foreign sellers excepted from this and other price regulations. Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchases of any commodity to be imported into the continental United States by any person who deals (1) directly with a foreign seller whose place of business is located outside the continental United States or (2) with his selling agent wherever located." (Max. Imp. Price Reg. issued Aug. 20, 1943, 8 Fed. Reg. 11681, Pike & Fisher, O.P.A. Service, paragraph 21, p. 141)

If they were such, the transaction was not subject to price control.

At a pretrial conference the trial judge ruled that the defendant Login was not the "selling agent" of the Cuban corporation, and that the sales therefore were subject to price control. The order provided:

"(Title of Court and Cause)

PRETRIAL ORDER

This cause came on for pretrial conference before the Hon. Michael J. Roche, Judge of the United States District Court, on Saturday, December 16,

1944, W. H. Brunner, Esq., appeared as the attorney for the plaintiff and Francis Carroll, Esq., appeared as attorney for the defendants.

Based upon proceedings at said pretrial conference, it is ordered as follows:

1. Upon the stipulation of facts entered into by the parties to said action, the Court finds that Login Corporation, as a matter of law was not the "selling agent of a foreign seller," with reference to so much of the canned Cuban Rock Lobster shipped in PFE Car No. 94433, as was sold by it to various wholesale buyers in the San Francisco Bay Area.

2. Upon said stipulation and such finding above set forth, the Court finds that the sales hereinabove referred to, were subject to price control under the provisions of the General Maximum Price Regulation and that the highest price that defendant might lawfully have charged for such sales and deliveries made by it in February and March of 1944 out of car referred to above was \$13.50 per case only, and no more.

3. At the trial of this Action, the issues to be tried by the Jury are limited to finding the quantity of sales made by defendant to wholesalers over and above the lawful maximum price of \$13.50 per case, and the dollar amount of overcharge made by the defendant, the assessing of damages on such overcharges, and to finding whether or not the action of defendant in making said sales above such maximum price was not willful or the result of de-

fendant's failure to take practicable precautions to avoid the occurrence of the violations.

4. Further hearing and the trial of said action be and the same is hereby continued to the time of trial set for January 30, 1945.

Dated this 8th day of January, 1945.

MICHAEL J. ROCHE,

Judge of the United States
District Court."

Thereafter the parties on February 7, 1944, stipulated to the amount of lobster sold in San Francisco and that if any violation occurred it was not willful. The stipulation provided:

"In the District Court of the United States, Northern District of California, Southern Division

No. 23329-R

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff.

vs.

THE LOGIN CORPORATION, a Corporation,
and L. P. GAINSBOROUGH,

Defendants.

STIPULATION OF FACTS

It Is Hereby Stipulated:

1. That of the Cuban Rock Lobster referred to in the stipulation of facts dated December 4, 1944,

on file herein and in the Pretrial Order made by the above entitled court, the [14] number of cases of said lobster which was sold to wholesale buyers in the San Francisco Bay Area was three hundred and thirty-four (334) cases; that the price at which said lobster was sold was Twenty-three and 50/100 Dollars (\$23.50) per case.

2. That if any violation of any price regulation occurred in the making of said sales said violation, if any, was neither willful nor the result of the failure of the defendants to take practicable precautions to avoid said violation, if any.

3. That the making of this stipulation is not an admission on the part of The Login Corporation that any violation occurred.

Dated: February 7, 1945.

GEORGE A. FARADAY,
W. H. BRUNNER,
Attorneys for Plaintiff.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Defendants."

The trial court thereupon rules that no question of fact remained for determination by a jury and entered its judgment awarding the plaintiff damages against the defendant Login for the actual amount of the overcharge, but denying the injunction. The judgment provided:

“(Title of Court and Cause)

JUDGMENT

“The above entitled action came on regularly for trial on Monday, February 12, 1945, before the Honorable Michael J. Roche, Judge of the United States District Court. The plaintiff was represented by W. H. Brunner, Esq., and the defendants by [15] Francis Carroll, Esq. It appeared to the court that as a result of the pretrial order made on December 16, 1944, and of the stipulation of facts entered into on February 7, 1944, no question of fact remained for determination by a jury except the compilation of the amount of the damages, and the attorney for the plaintiff having stated that the action might be dismissed as to the defendant L. P. Gainsborough, it is

Ordered, Adjudged and Decreed:

1. That plaintiff's application for injunction be and the same is hereby denied.
2. That said action be dismissed as to the defendant L. P. Gainsborough.
3. That plaintiff have judgment against the defendant Login Corporation for the sum of \$3,340.00.

Dated: This 28th day of March, 1945.

MICHAEL J. ROCHE,

Judge of the United States
District Court.

Approved as to form as provided in Rule 5(d).

FRANCIS CARROLL,

Attorney for Defendant.

W. H. BRUNNER,

Attorney for Plaintiff."

The defendant Login on June 13, 1945, filed its notice of appeal from that portion of the judgment providing that the plaintiff have judgment against the defendant The Login Corporation.

STATEMENT OF POINTS RELIED UPON BY APPELLANT

The points relied upon by the defendant and appellant The Login Corporation for the reversal of the judgment entered are:

Point Number One

(a) That the question to be determined by the trier of fact in the lower court was whether, as to the 334 cases of lobster, these were purchases by persons who dealt with the "selling agent" of a foreign seller within the meaning of the Maximum Import Price Regulation. [16]

(b) That in determining this question reasonable men could draw but one conclusion from the facts stipulated to, and these facts would support

but one inference, namely: They were purchases by persons who dealt with the "selling agent" of a foreign seller.

(c) That the trial court therefore at the time of trial would have been obliged to direct the jury to return a verdict in favor of the defendant and appellant because the transaction was not subject to price control.

(d) That the order and judgment of the trial court therefore were in error and that the judgment should be reversed with directions to enter judgment for the defendant and appellant.

Point Number Two

That if the defendant and appellant is in error in paragraph (b) of its first point then at all events the question to be determined in the trial court was one of fact for the jury, under proper instructions from the trial court and that court erred in determining the matter in pretrial conferences thus depriving the defendant and appellant of its right to a trial by jury.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Defendants.

W. H. BRUNNER,
Attorney for Plaintiff.

Approved:

MICHAEL J. ROCHE,
Judge of the District Court.

[Title of District Court and Cause.]

COMPLAINT FOR INJUNCTION AND
TREBLE DAMAGES

Count One

1. In the judgment of the Price Administrator, the defendants have engaged in actions and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942, (Pub. Law 421, 77th Cong. 2d Sess., c. 26, 50 U.S.C.A. Appx., 901 et seq.), hereinafter called "the Act," in that they violated General Maximum Price Regulation, as amended (8 F.R. 3096)—Commodities and Services—effective in accordance with the provisions of said Act; and therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Section 4(a).

2. Jurisdiction of this action is conferred upon this [18] Court by Section 205(c) of the Act.

3. At all times mentioned herein there has been in effect pursuant to the Act, said General Maximum Price Regulation, as amended, (8 F.R. 3096), establishing maximum prices for the sale of commodities including therein Cuban Rock Lobster.

4. Between the 1st day of December, 1943, and the 1st day of May, 1944, defendants sold and offered to sell, and continued to sell and offer for sale, Cuban Rock Lobster, at prices in excess of the maximum prices permitted by the said Maximum Price Regulation, as amended.

Count Two

1. Plaintiff, as Administrator, Office of Price Administration, brings this action for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2d Sess., c. 26, 56 Stat., 23), enacted January 30, 1942, hereinafter called "the Act."

2. Jurisdiction of this action is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

3. Paragraphs 3 and 4 of Count I are incorporated by reference as if fully set forth herein.

4. None of the said purchases was made for use or consumption other than in the course of trade or business.

5. Plaintiff is informed and believes, and therefore alleges that three times the aggregate amount by which the prices received by the defendants in the transactions referred to in paragraph 4 of Count I exceed the maximum prices provided by said General Maximum Regulation, as amended, equals \$10,020.

Wherefore, the Administrator demands:

1. A permanent injunction enjoining the defendants, their officers, agents, employees, and all persons in active concert or participation with the defendants from: [19]

directly or indirectly selling, delivering or offering for sale or delivery, any Cuban Rock Lobster at

prices in excess of those established by General Maximum Price Regulation, as amended, or otherwise violating or attempting or agreeing to do anything in violation of any Regulations or Orders adopted pursuant to the Emergency Price Control Act of 1942, establishing maximum prices for any of said Cuban Rock Lobster.

2. Judgment on behalf of the United States against the defendants in the sum of \$10,020.

3. Such other, further, different relief as to the Court may seem just and proper.

Dated at San Francisco, California, this day of May, 1944.

THOMAS C. RYAN,

W. H. BRUNNER,

RALPH GOLUB,

Attorneys for Plaintiff.

[Endorsed]: Filed May 24, 1944. [20]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on Monday, February 12, 1945, before the Honorable Michael J. Roche, Judge of the United States District Court. The Plaintiff was represented by W. H. Brunner, Esq., and the defendants by Francis Carroll, Esq. After both oral and documentary

evidence was offered on behalf of both parties and the matter having been submitted to the Court for decision, the Court hereby finds as follows:

FINDINGS OF FACT

1. That all of the matters, facts and things alleged and set forth in Count One of plaintiff's complaint are and each of them is true. [21]

2. That in March, 1942, defendant Login Corporation established a maximum price for the sale by it of Cuban Rock Lobster to wholesalers of \$13.50 per case; that during the period covered by the complaint defendant sold 334 cases of Cuban Rock Lobster to wholesalers at a price of \$23.50 per case, or \$10.00 in excess of the maximum price permitted for such sale.

3. That such violation of the price regulations was made inadvertently and was neither willful nor the failure of defendant to take practicable precautions to avoid such violation.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing findings of fact, the Court concludes:

1. That plaintiff's application for injunction should be and the same is hereby denied.

2. That plaintiff should have judgment against defendant on behalf of the United States for the sum of \$3,340.00.

Let judgment be entered accordingly.

MICHAEL J. ROCHE,

Judge of the United States
District Court.

Dated: March 28, 1945.

Receipt of a copy of the within proposed Findings of Fact and Conclusions of law is admitted this 8th day of March, 1945.

KEESLING & KEIL,

FRANCIS CARROLL,

Attorneys for Defendants.

[Endorsed]: Filed Mar. 28, 1945. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that The Login Corporation, a corporation, a defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that part of the judgment entered in this action on March 28, 1945, which orders that the plaintiff have judgment against the defendant The Login Corporation for the sum of \$3,340.

Dated: June 6, 1945.

KEESLING & KEIL,

FRANCIS CARROLL,

Attorneys for Appellant, The Login Corporation, a
Corporation.

[Endorsed]: Filed Sept. 5, 1945. [23]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including September 1, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: July 23, 1945.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed July 23, 1945. [24]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including September 11, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 1, 1945.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 1, 1945. [25]

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 23329-R

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

vs.

THE LOGIN CORPORATION, a Corporation,
and L. P. GAINSBOROUGH,

Appellant.

ORDER EXTENDING TIME FOR FILING OF
RECORD ON APPEAL

Upon consideration, and good cause appearing
therefor;

It Is Hereby Ordered that the time within which
the record on appeal in the above entitled action
may be filed in this court is hereby extended thirty
days to and including the 11th day of October, 1945.

Dated: September 11, 1945.

FRANCIS A. GARRECHT,

Judge of the United States
Circuit Court of Appeals.

[Endorsed]: Filed Sept. 11, 1945, Paul P.
O'Brien, Clerk.

A True Copy. Attest: Sept. 28, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Sept. 28, 1945. [26]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 26 pages, numbered from 1 to 26, inclusive, contain a full, true, and correct transcript of the Agreed Statement of Case under Rule 76 of the Rules of Civil Procedure in the case of Chester Bowles, Administrator, Office of Price Administration, Plaintiff, vs. The Login Corporation, a corporation, and L. P. Gainsborough, Defendants No. 23329-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$4.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 1st day of October, A.D. 1945.

[Seal]

C. W. CALBREATH,
Clerk.

By E. VAN BUREN,
Deputy Clerk. [27]

[Endorsed]: No. 11151. United States Circuit Court of Appeals for the Ninth Circuit. The Login Corporation, a Corporation, Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division.

Filed October 5, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for the
Ninth Circuit

No. 11151

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee,

vs.

THE LOGIN CORPORATION, a Corporation,
and L. P. GAINSBOROUGH,

Appellant.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD

The appellant, the Login Corporation, hereby adopts as its statement of points relied upon on appeal the statement of points appearing in the agreed

statement of the case in the transcript of the record at pages 13 and 14 of the agreed statement.

The appellant designates for printing the entire transcript of the record filed with the clerk of the above entitled court.

Dated: October 8, 1945.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Appellant.

[Endorsed]: Filed October 9, 1945, Paul P. O'Brien, Clerk.

No. 11,151

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE LOGIN CORPORATION (a corporation),
Appellant,

VS.

CHESTER BOWLES, Administrator, Office of
Price Administration,
Appellee.

BRIEF FOR APPELLANT.

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No. 11,151

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE LOGIN CORPORATION (a corporation), vs. CHESTER BOWLES, Administrator, Office of Price Administration,	<i>Appellant,</i> <i>Appellee.</i>
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BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

This is an action for alleged violation of the Emergency Price Control Act of 1942. (Pub. Law 421, 77th Congress, 2d Sess., c. 26, 50 U.S.C.A. App. 901 et seq.)

(Plaintiff's complaint, par. 1 of Count One. Tr. p. 22.)

Jurisdiction was conferred on the District Court by Section 205(c) of that Act.

Jurisdiction of this appeal from the judgment of said Court is conferred on this Court by Section 128 (a) of the Judicial Code. (43 Stat. L. 936, 28 U.S.C.A. paragraph 225.)

The notice of appeal from the judgment of the District Court appears at page 26 of the transcript.

The judgment appears at page 19 of the transcript.

STATEMENT OF THE CASE.

The plaintiff, Administrator, Office of Price Administration, hereinafter called the plaintiff, filed a complaint charging that the defendants made sales of Cuban lobster at prices in excess of the maximum prices permitted by the General Maximum Price Regulation. The defendants' answer denied the charges and a jury trial was demanded by them.

During pretrial conferences a stipulation of facts was entered into. (Tr. pp. 3 to 13.) It shows that the defendant, The Login Corporation, a California corporation, hereinafter referred to as "Login", was engaged in selling Cuban lobster as sales agent for Cia. Comercial Gainsborough, a corporation of Havana, Cuba, for export to Hawaii. (Tr. p. 5.) No violation is charged as to the sales made for export to Hawaii, but, in the course thereof certain sales were made to purchasers in the San Francisco area, in the manner set forth in the stipulation. It is these sales which are claimed to have been made in violation of the price regulation.

If these sales were made by Login as selling agent for the Cuban corporation, as they appeared on their face to have been, they were not subject to the General Maximum Price Regulation, and there was no viola-

tion. This—for the reason that if Login was the selling agent of a foreign seller the sales were expressly exempted from price control by the Maximum Import Price Regulation. (Tr. pp. 14 and 15.)

At a pretrial conference the trial Court ruled, contrary to the argument of Login, that on the stipulation of facts entered into, Login, as a matter of law, was not the “selling agent” of a foreign seller, within the meaning of the Maximum Import Price Regulation, with reference to the lobster sold in the San Francisco market, and ordered this issue removed from those to be tried by the jury at the time of trial. It ruled that the sales in question were subject to price control. (Tr. p. 16.)

This was the point at issue in the case. The parties later stipulated to the only other facts remaining undetermined, namely, the amount of lobster sold in the Bay Area, and that, if any violation occurred, it was not willful. (Tr. p. 17.)

Thereupon the trial Court ruled that as a result of its pretrial order above mentioned and of the just mentioned stipulation no question remained to be determined by the jury except the compilation of damages and therefore entered judgment against the defendant Login for the amount of the alleged overcharge, although denying the plaintiffs’ application for an injunction. (The action was dismissed as to the defendant Gainsborough.) (Tr. p. 19.)

This appeal was taken by Login. The record is presented by an agreed statement of the case (beginning on page 2 of the transcript) under Rule 76.

The question involved on the appeal is whether the trial Court erred in ruling that Login as a matter of law was not a selling agent.

SPECIFICATION OF ERRORS.

The Court erred in ruling at the pretrial conference that Login, as a matter of law, was not the selling agent of a foreign seller within the meaning of the Maximum Import Price Regulation, paragraph 2 of Article I, which at the time in question provided:

“Purchases from foreign sellers excepted from this and other price regulations. Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchases of any commodity to be imported into the continental United States by any person who deals directly with a foreign seller whose place of business is located outside the continental United States, or with his selling agent wherever located.” (Max. Imp. Price Reg. issued Aug. 20, 1943, 8 Fed. Reg. 11681, Pike & Fisher, O.P.A. Service, paragraph 21, p. 141.)

SUMMARY OF ARGUMENT.

I.

HISTORY OF USE OF TERM "SELLING AGENT" IN THE MAXIMUM IMPORT PRICE REGULATION.

II.

THE FACTS SHOW AFFIRMATIVELY NOT ONLY THAT LOGIN WAS THE SELLING AGENT OF A FOREIGN SELLER BUT THAT IT WAS SUCH AS A MATTER OF LAW. AT THE TIME OF THE TRIAL, HAD ONE BEEN HELD, THE COURT WOULD HAVE BEEN OBLIGED TO DIRECT JUDGMENT FOR THE DEFENDANT. THE COURT THEREFORE ERRED IN RULING AS A MATTER OF LAW THAT LOGIN WAS NOT A SELLING AGENT.

III.

THE FACTS ARE NOT SUFFICIENT TO SUPPORT A FINDING THAT IN THE SALES IN QUESTION LOGIN DID NOT ACT AS IT PURPORTED TO, NAMELY, AS SELLING AGENT. THE BURDEN OF PROOF IMPOSED UPON THE PLAINTIFF, THEREFORE, WAS NOT SUSTAINED. AT THE TIME OF THE TRIAL THE COURT WOULD HAVE BEEN OBLIGED TO DIRECT JUDGMENT FOR THE DEFENDANT. IT THEREFORE ERRED IN RULING THAT LOGIN AS A MATTER OF LAW WAS NOT A SELLING AGENT.

IV.

EVEN THOUGH IT BE HELD THAT THE EVIDENCE DOES NOT, AS A MATTER OF LAW, SHOW LOGIN TO BE A SELLING AGENT, IT AT LEAST PRESENTS A QUESTION OF FACT AS TO WHETHER LOGIN WAS A SELLING AGENT OR WAS ACTING IN ITS OWN BEHALF. THE QUESTION, THEREFORE, WAS ONE OF FACT FOR THE JURY UNDER PROPER INSTRUCTIONS

AS TO THE MEANING OF THE TERM "SELLING AGENT" OF A FOREIGN SELLER, AND THE COURT ERRED IN RULING, AS A MATTER OF LAW, THAT LOGIN WAS NOT A SELLING AGENT.

ARGUMENT.

I.

HISTORY OF USE OF TERM "SELLING AGENT" IN MAXIMUM IMPORT PRICE REGULATION.

The term "selling agent" of a foreign seller was not defined in the Maximum Import Price Regulation at the time of the sales here in question, nor had it been defined in any of the preceding regulations of the Office of Price Administration on the subject.

The term was first used in this connection by the O.P.A. in Revised Supplementary Regulation No. 12 (7 Fed. Reg. 10532) issued December, 1942, which, at the time governed sales of imported goods. It provided, in Section 1499.1404:

"This regulation shall not apply to:

(a) purchases of commodities to be imported by a person who deals directly with the seller or his selling agent wherever located."

Amendment No. 1, issued January 1, 1943, 8 Fed. Reg. 611, amended the section to read as follows:

"1499.1404 Exceptions:

(a) This regulation and the General Maximum Price Regulation shall not apply to:

1. Purchases of commodities to be imported by a person who deals directly with a foreign seller

outside the continent of the United States, or his selling agent wherever located.”

Revised Supplementary Regulation No. 12 was re-issued as the Maximum Import Price Regulation on August 20, 1943. It reenacted substantially the same provision in paragraph 2 of Article I:

“Purchases from foreign sellers excepted from this and other price regulations. Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchases of any commodity to be imported into the continental United States by any person who deals directly with a foreign seller whose place of business is located outside the continental United States or with his selling agent wherever located.” (Max. Imp. Price Reg. Issued August 20, 1943, 8 Fed. Reg. 11681, Pike & Fisher, O.P.A. Service, paragraph 21, p. 141.)

The only official explanatory matter issued by the O.P.A. with these regulations regarding the term “selling agent” was that contained in the Statement of Considerations issued on December 14, 1942 in connection with Revised Supplementary Regulation No. 12, as required by law. It stated in part as follows:

“The changes in this revision may be summarized as follows:

1. * * *

2. *Purchases of commodities from abroad from an agent of a foreign seller in this country are treated as direct purchases from a foreign seller*

and are exempt from the General Maximum Price Regulation * * *.

On May 21, 1942, shortly after the G.M.P.R. became effective, the O.P.A. announced that the price at which goods might be purchased from a foreign seller was not subject to the provisions of that regulation if the domestic importer dealt directly with the seller in a foreign country, although the importer's resale in the United States was under the G.M.P.R. That interpretation is now embodied in this revision. However, *the exemption embodied in this revision includes the purchases made through the selling agent of a foreign seller contrary to the prior interpretation publicly issued.* The reason for this change is that it has been established that agents of foreign sellers ordinarily serve only the functions of bringing together the buyer in this country and the seller abroad, and did not have authority to set the price or terms of sale." (Pike and Fisher, O.P.A. Service, paragraph 21, pp. 521, 522.) (Italics are appellant's.)

This was the state of the regulations of the Office of Price Administration at the time of the sales under attack in regard to the term in question. They did not otherwise define the term.

II.

THE FACTS SHOW AFFIRMATIVELY NOT ONLY THAT LOGIN WAS A SELLING AGENT BUT THAT IT WAS SUCH AS A MATTER OF LAW.

An analysis of the facts stipulated to demonstrates beyond question that Login acted as selling agent for the Cuban corporation:

1. Nearly eighteen months before the transactions in question, Login had ceased importing lobster in its own behalf:

“At this time Login discontinued handling lobster * * *” (Tr. p. 4.)

2. Login primarily is a sales agent; it negotiates sales for others. (Tr. p. 3.)

3. It was the selling agent for the Cuban corporation in making the sales for export to Hawaii in the course of which the sales in question occurred:

“In October of 1943 Login as sales agent started selling Cuban lobster for the Cuban corporation for export to Hawaii.” (Tr. p. 5.)

4. The purchasers' only contact with Login and Login's only contact with them was as sales agent. Login notified the brokers through whom they ordered the lobster that it, Login, could not import and sell lobster, but that it could, as agent, arrange for the purchase of lobster from its principal in Cuba by buyers whose ceiling permitted them to import and sell. (Tr. p. 5.) *The purchasers bought on this basis:*

“On this basis orders were taken * * * through the local broker.” (Tr. p. 5.)

5. The documents of the sales prove that Login acted as agent:

The sales memorandum given the purchasers by the broker through whom they ordered stated that: The sales were "for the account of" Roberts as "agents for Cia. Comercial Gainsborough". (Tr. p. 5.)

The confirmation of sale issued by Login to the purchasers, confirming and containing all of the terms of the sales contract, stated that Login acted "as agent for Cia. Comercial Gainsborough". (Tr. p. 8.) The invoices were sent to the purchasers by Login "as agent for Cia. Comercial Gainsborough". (Tr. p. 8.)

6. Login accounted to the Cuban corporation as agent for all the proceeds of the sales received by it, remitting to it everything except the charges incurred and its commission. (Tr. p. 9.)

7. Login was compensated as an agent at a five per cent sales commission. (Tr. p. 9.)

From these facts it is submitted but one conclusion can reasonably be drawn, namely, that Login acted in this transaction as selling agent.

The plaintiff himself admits by the stipulation that Login at the outset of the sales transaction involving the carload of lobster was the selling agent for the Cuban corporation:

"In October of 1943 Login *as sales agent* started selling Cuban lobster * * *." (Tr. p. 5.)

There is no evidence in the record that it ever ceased to act as agent. There is no evidence in the facts stipu-

lated to that it ever commenced to operate in its own behalf, or that any part of the carload was sold in any different manner from any other, or that it ever sold in its own behalf in the sales in question. So far as the record shows the sales in the San Francisco area were part and parcel of the sale of the entire carload, as to the balance of which, other than the San Francisco area sales, Login was admittedly a sales agent.

Documentary evidence of the sales made at the time thereof is incontrovertible evidence that Login had continued to act as sales agent. The orders were taken from the purchasers by Roberts on the basis of the facts given it by Login, namely, that it could arrange for the purchases only as agent. The confirmation of sale by Login and its invoices are written evidence that it continued to act as agent.

Every action taken by it bespeaks the same character: It had long ceased to import in its own behalf; its statement to the broker that it could not import in its own behalf but could as agent; its accounting for the proceeds of sale; the mode in which it was compensated—all prove the relationship of agent.

No different result can follow from an analysis of Login's legal position. Its relationship in law was that of agent, to the purchasers, and to its principal, the Cuban corporation:

Certainly the purchasers' only dealings with Login were as agent. They contracted with Login only in this capacity. They could sue it only as agent and they could impose upon it only an agent's responsibility.

Their sales contract was primarily with the Cuban corporation. Login never acted in any other capacity than agent in its relationship with the purchasers.

The same is true as to its relationship with its principal the Cuban corporation. As to it Login was admittedly its selling agent. It accounted to it as such and its compensation from it was as such. No possible reason for holding it to have any other relationship to the Cuban corporation can be found in the record.

It is submitted that all of the evidence in this record leads to but one conclusion and that is that Login acted as selling agent in the transaction in question. Appellant submits that no reasonable man could conclude otherwise from the evidence and that there is no legal relationship arising from the facts which would require any Court to rule otherwise. Login, in this situation, we submit, was the selling agent of the Cuban corporation, *as a matter of law*. Being such, the sales were exempt from price control and there was no violation.

Under these circumstances had the case proceeded to trial the Court would have been obliged to direct a verdict in favor of Login. The trial Court's ruling therefore was not only flagrantly in error but is directly contrary to the only conclusion which can be drawn from the facts. The judgment should be reversed with directions to enter judgment for the appellant.

III.

THE FACTS ARE NOT SUFFICIENT TO SUPPORT A FINDING THAT IN THE SALES IN QUESTION LOGIN DID NOT ACT AS IT PURPORTED TO NAMELY AS SELLING AGENT. THE BURDEN OF PROOF IMPOSED UPON THE PLAINTIFF, THEREFORE, WAS NOT SUSTAINED. AT THE TIME OF THE TRIAL THE COURT WOULD HAVE BEEN OBLIGED TO DIRECT JUDGMENT FOR THE DEFENDANT.

As has been pointed out the sales relied upon by the plaintiff to show a violation of the regulation were those made to purchasers in the San Francisco Bay Area. To secure a judgment against the defendant the plaintiff of course has the burden of proving the making of the sales and of proving that they violated the regulation. The evidence upon which he must rely is that contained in the stipulation.

However, all of the evidence upon which the plaintiff must rely in order to prove the *making* of the sales shows only sales made by Login *as agent*. *All* the evidence concerning the making of those sales—that is all of the facts stipulated to regarding them—*shows that they were made by Login as sales agent*. The orders were taken from the purchasers on the basis that Login as sales agent would arrange the purchase from its principal. The sales memorandum shows the sales were made for the account of E. L. Roberts Co., “as agents for Cia. Comercial Gainsborough”. The confirmation of the sale and the invoices likewise show that the sale was made on behalf of the Cuban corporation by Login as sales agent. *All* of the evidence regarding Login’s relationship with the purchasers is evidence of agency on Login’s part. Thus the evidence of the sales contracts themselves, and the evi-

dence of the making of them, is proof only of sales by a selling agent.

But the plaintiff was obliged to prove more than this. He was obliged to prove sales by Login acting in its own behalf. This required him to prove that the sales which he attacks were not what they appeared on their face to be, namely, sales by Login as agent for the Cuban corporation. Unless he did so no violation was shown since the sales he did prove were expressly exempted from the regulation as sales by a selling agent. The burden to prove a violation was on the plaintiff. He was therefore required to prove that the sales were in fact made by Login acting in its own behalf and not as agent.

The appellant submits there is no such evidence in the record. The stipulation contains all of the plaintiffs' proof. It contains no evidence that the sales were not made in good faith as they purported to be. It contains no evidence that they were made by Login acting in its own behalf.

Thus had a trial been had the trial Court, for this reason, if for no other, would have been obliged to direct a verdict in favor of the defendant Login. The action taken by the Court in pre-trial conference ruling Login as a matter of law not to be a selling agent was not only in error, but directly contrary to the ruling which it should have made at the time of trial.

Because the record contains all of the evidence, and because it does not contain proof of a violation it is submitted that the judgment should be reversed with directions to enter judgment for the appellant.

IV.

EVEN THOUGH IT BE HELD THAT THE EVIDENCE DOES NOT, AS A MATTER OF LAW, SHOW LOGIN TO BE A SELLING AGENT, IT AT LEAST PRESENTS A QUESTION OF FACT AS TO WHETHER LOGIN WAS A SELLING AGENT OR WAS ACTING IN ITS OWN BEHALF. THE QUESTION, THEREFORE, WAS ONE OF FACT FOR THE JURY UNDER PROPER INSTRUCTIONS AS TO THE MEANING OF THE TERM "SELLING AGENT" OF A FOREIGN SELLER, AND THE COURT ERRED IN RULING AS A MATTER OF LAW THAT LOGIN WAS NOT A SELLING AGENT.

Even though the Court should not hold that Login as a matter of law was a selling agent, nevertheless the facts were such that Login was at least entitled to have the jury determine this issue.

It is of course the rule that where the evidence is such that different inferences may be drawn from it the determination of the ultimate question of fact to be decided from the evidence is the province of the trier of fact.

The ultimate question of fact to be decided in this case was whether Login had acted as selling agent of the Cuban corporation or in its own behalf. This question necessarily is to be decided from all of the facts surrounding the transaction.

These evidentiary facts normally would have been presented by the plaintiff and defendant through oral testimony to the trier of fact—in this case the jury. From the evidentiary facts so presented the jury would have determined the ultimate question of fact: Was Login acting as selling agent or in its own behalf? Its decision would have been final. Such determinations are the province of the jury under proper instructions.

In this case in lieu of the plaintiff and defendant establishing the evidentiary facts through witnesses, they stipulated to them in writing. They did not stipulate to the ultimate fact to be decided, i.e., whether Login acted as selling agent or in its own behalf. The determination of that fact was the province of the trier of fact.

If different inferences could be drawn from the facts stipulated to Login was entitled to have this question determined by the jury just as much as if the trial had proceeded without a stipulation. There can be no doubt of its right to a jury trial had the facts been presented by oral testimony to the jury. The rule is not different because the facts are uncontradicted and stipulated to.

Parties do not waive their right to a final determination of questions of fact by the trier of fact—be it Court or jury—because the evidence is without conflict or because they have stipulated to part of it, or all of it. These things in themselves are not determinative of the right.

Rather, the test of the right to determine the ultimate question of fact is whether different inferences can reasonably be drawn from the evidence. If they can the question is one for the trier of fact regardless of whether the evidence be uncontradicted, or stipulated to in writing. Such is well established law:

“It (the court) may adopt the agreed statement (of facts) as its own findings of fact, or it may make findings therefrom to correspond with

the issues to be determined; and, as it is required to find only the ultimate facts in the case, it may find such ultimate facts from the probative facts set out in the agreed statement, as well as from evidence thereof. An agreed statement of facts is but a substitute for evidence of those facts * * *"

Towle v. Sweeney (1905), 2 Cal. App. 29, 31, 83 Pac. 74.

"The evidence in the instant case was without conflict, and the findings rest on inferences drawn from declarations of the board, together with circumstances judicially noticed; and though the facts would support inferences favorable to the appellant, those drawn by the court also find reasonable support therefrom. They fairly overcome the presumptions mentioned, and sustain the conclusion that no necessity or emergency within the meaning of the charter was shown. Where fair and impartial minds may draw different conclusions from the evidence though there be no conflict therein, the conclusions drawn by the trial court must be sustained on appeal", citing cases.

Spreckels v. San Francisco, 76 Cal. App. 267, 275, 244 Pac. 919. (Hearing denied.)

"There was considerable testimony by both of the plaintiffs and minute cross-examination of them on that subject. The employees of defendant were also closely examined touching the same matter. (2) While no particularly glaring conflicts are present, different conclusions as to the knowledge and conduct of the plaintiffs may be reasonably drawn by different minds from the

same evidence, thus presenting a case peculiarly within the province of the jury to determine.”

Meindersee v. Meyers, 188 Cal. 498, 502, 205 Pac. 1078.

“There is but little, if any, conflict in the evidence. *What inferences should the court have drawn from the substantially uncontradicted evidence is really the question presented by the record.* We have examined the evidence with care, and are free to say that if the court had found that the offer of Hatcher was not made and accepted in good faith, but for the purpose of defrauding defendant we would have sustained such finding.

“But from this it does not follow that we are not obliged to sustain the finding made. *Where fair and impartial minds may draw different conclusions from the evidence, though there be no conflict in the testimony, it is a case for the jury or trial court to decide.*” (Italics ours.)

Bettens v. Hoover, 12 Cal. App. 313, 318, 107 Pac. 329.

On this point, the issue on appeal is not whether there is support in the record for a trial Court’s ruling that Login was not an agent. Even though this were true the trial Court’s ruling in this case is error, nevertheless, if there are any other facts in the record which would support a contrary finding.

Rather, the issue before the Court on this point is whether there are *any* facts in the evidence stipulated to from which a jury could conclude that Login had

acted as selling agent. If there were then a question of fact was presented by the evidence which should have been submitted for decision to the jury.

Appellant submits it is too obvious for argument that from the facts stipulated to any jury could reasonably have found that Login had acted as selling agent for the Cuban corporation. The evidence therefore presented a question of fact—whether Login was acting as selling agent, or in its own behalf—which should have been submitted for determination to the jury under proper instructions. The trial Court therefore erred in ruling as a matter of law that Login was not a selling agent, thus denying appellant a determination of this question by the jury it had demanded.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed with directions to enter judgment for the appellant.

Dated, San Francisco,

January 2, 1946.

KEESLING & KEIL,

FRANCIS CARROLL,

Attorneys for Appellant.

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United States Circuit Court of Appeals
For the Ninth Circuit

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BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This action was brought by the Administrator of the Office of Price Administration, for injunctive relief and statutory damages under Section 205(a) and (e), of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 50 U.S.C. App. 925(a), (e)). Jurisdiction of the District Court was invoked under Section 205(c) of the Act; that of this court under 28 U.S.C. sec. 225 (Jud. Code s. 128). The complaint alleged that between December 1, 1943 and May 1, 1944, defendants sold Cuban Rock Lobster at prices in excess of the maximum prices permitted by the General Maximum Price Regulation, as amended (8 F.R. 2096), establishing maximum prices for the sale of such commodities (R. 22, 23).

During pre-trial conferences the parties entered into stipulation setting forth the following facts: The Login Corporation, a California corporation located in San Francisco, California, operates primarily by negotiating sales for others to purchasers secured by Login but at times acts as an importer in its own behalf. Its president is L. P. Gainsborough, Compania Commercial Gainsborough, hereinafter sometimes referred to as the foreign or Cuban seller, is a Cuban exporter. In March 1942, Login had imported lobster from Cuban canners and had established a price ceiling of \$13.50 per case under the General Maximum Price Regulation (R. 4). Because of the price rise in Cuba and its own low ceilings, Login discontinued importing lobster although the demand for it was great (R. 4, 5). In October of 1943, Login negotiated sales for a quantity of lobster to be routed from Cuba through San Francisco to Hawaii. It was necessary to ship a full carload to avoid the high "less than carload" rates and 334 cases were needed in addition to the other shipment to make up the carload. Login, who had been under pressure to bring lobster into San Francisco (R. 5), then caused the Cuban seller to ship a full carload, arranging with the Bank of California to issue a letter of credit financing the shipment. This letter of credit was secured by Login and the Cuban seller was notified as to its terms and the terms of shipment of the lobster. The stipulation states that "when the taking of orders was completed" Login issued a confirmation of sale to the Cuban corporation (R. 6). However, Exhibit "E" (a part of the

stipulation) clearly shows that the said statement contained in the body of said stipulation was incorrect, for the following reason: The confirmation, issued on October 7, 1943 (R. 13), recites that Login thereby confirmed a "sale" to "various buyers in San Francisco Bay Area and Hawaii" and asserted that the sale had been confirmed by wire of the same date from the Cuban importer. However, the record shows that as of that date no orders had been placed with Login by San Francisco purchasers. Indeed, it was not until December 1943 that Login took orders for the sale of the 334 cases—and this through a local food broker at \$23.50 per case (R. 5).

The issue is, as stated in Appellant's Brief (App. Br. p. 5), whether these sales in December were made by Login as an independent seller—in which case the sales were subject to, and because in excess of its ceilings in violation of, the General Maximum Price Regulation; or were made by Login as selling agent of the foreign seller—in which case they are covered by the Maximum Import Price Regulation (8 F.R. 11681), (R. 14, 15).

At a pre-trial conference the court ruled that on the facts stipulated, Login was not the selling agent of the foreign seller (R. 16), and that the sales in December were subject to the General Maximum Price Regulation. The parties thereupon entered into a further stipulation covering amount of lobster so sold, and that the violations, if any, were neither willful nor the result of the failure of the defendant to take practicable precautions to avoid same (R. 17, 18). No

further questions remaining for submission to the jury, the court entered its order giving judgment to the plaintiff against the appellant for the sum of \$3,340.00 (the exact amount of the overcharges) (R. 19). The request for an injunction was refused (R. 25).

On this appeal the appellant urges three grounds for reversal of the judgment below:

(1) That the facts show that Login was a "selling agent" as a matter of law;

(2) That there is no evidence that Login did not act as selling agent in making the sales in question;

(3) That even if Login was not as a matter of law to be held a selling agent, it was a jury question and the court erred in removing this issue from the jury.

The administrator respectfully submits that the judgment is supported by sound conclusions of law based upon proper findings of facts, and that the contentions advanced by the appellant are not well grounded.

ARGUMENT.

I.

THE FACTS SET FORTH IN THE STIPULATION AND THE EXHIBITS CONSTITUTED LOGIN A SELLER AS A MATTER OF LAW AND THE COURT CORRECTLY SO HELD.

The fact that Login called itself "agent" affects its status as buyer, and later as seller, not a whit. The courts will still examine the facts to determine whether a transaction by which goods are shipped by one

party to another for sale by the latter is to be regarded as a consignment for sale—creating the relation of principal and agent between consignor and consignee and resulting in title remaining in the consignor—or one creating the relation of buyer and seller, with the resulting transfer of title to the consignee. Since in a sense all goods are shipped on consignment the answer to the question will depend upon the manner in which the parties act with reference to it: *In re Wells*, 140 F. 752.

If from the whole agreement it is patent that the property is to pass to the person receiving the goods for a price to be paid by him, the transaction is as a matter of law a sale or a contract of sale: *In re Zephyr Mercantile Co.*, 203 F. 576; *Coweta Fertilizer Co. v. Brown*, 163 F. 162; *In re Heckathorn*, 114 F. 499; *In re Wells*, supra. In general, provisions that the consignee shall on receipt of the goods, or at some stated time or times thereafter, pay for all goods received, and that he may sell to whom he will at what price and on what terms he will, are characteristic of a contract of sale, whatever terms may be used in describing it: 6 *C.J.* 1092.

Some agreements call for close scrutiny, due to the inclusion, as here, of some provisions peculiar to contracts of sale and others peculiar to contracts of consignment or agency; and often they seem to have been drawn with a view toward enabling the parties to treat the contract as of either kind: *Banker Bros. Co. v. Pennsylvania*, 222 U.S. 210, 32 S.Ct. 38; *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U.S.

373, 31 S.Ct. 376; *Sturm v. Boker*, 150 U.S. 312, 14 S.Ct. 99. But the substance of a contract controls the construction despite any language which might be used: *Greenough v. Willcox*, 238 Mich. 52; *Chezum v. Kreighbaum*, 4 Wash. 680; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 42 S.Ct. 360; *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 37 S.Ct. 412; *Vermont Marble Co. v. Brow*, 109 Cal. 236; 1 Mechem, Sales, Sec. 46, p. 45; Restatement of Agency, Sec. 1, b. The instrument must be dissected into its component parts, which, under close scrutiny, must reveal true agency. *U. S. v. City and County of San Francisco*, 23 F. Supp. 40.

The record in this case shows that when Login acted as a selling agent it “accepts orders for submission” to foreign suppliers (R. 4). But when in October 1943, Login arranged for a shipment of Cuban lobster to Hawaii, because of the high “less than carload” rates then in effect, it felt constrained to bring in from Cuba 334 cases in addition to the Hawaiian shipment (R. 5). The exact chronological sequence is somewhat obscured in the record but it appears from examination that Login ordered the full carload of lobster on October 7, 1943 (Exhibit “E”, R. 13), and at that time it had taken *no orders* from customers. This was a radical departure from Login’s usual mode of operation in course of which “as sales agent”, it “accepts orders for submission to foreign suppliers” (R. 4)—the normal function of seller’s agent. In this instance Login issued its “confirmation” reciting a present “sale” to “various buyers”,

setting forth all the terms and conditions—price, terms of payment, method of shipment, and quantity.¹ This acknowledgment of “sale” was likewise confirmed by the Cuban seller on the same date. Since Login in fact was not transmitting any orders to the foreign seller but nonetheless purported to have consummated a “sale”, and his “principal” purported to have confirmed the same, the issue on this point narrows itself to a discovery of the true legal effect of the transaction.

The shipment, pursuant to the sale, was necessarily in transit before any contracts for sale were negotiated by Login.² Not until November 29, does the record show any sale or offer for sale, which was done through E. L. Roberts, a San Francisco food broker (Exhibit “A” R. 11). The memorandum issued at that time by Roberts recited that the sale was “subject to confirmation of seller” before becoming effective. And not until December 2, did Login, still purporting to act as “agent”, confirm this sale. This was nearly two months after the Cuban Corporation had divested

¹It is to be noted that shipment was to be “F.O.B., C.I.F., F.A.S.” San Francisco—stipulations usual in sales contracts and interpreted generally as referring to an executed contract of sale deliverable to the specified delivery point, any title reserved in the consignor being for security purposes only. *Boston Iron etc. Co. v. Rosenthal*, 68 C.A.2d 564, 156 P.2d 963.

²This assumption is fairly inferable from the fact that the trust arrangement required drafts to be accompanied “with invoice, consular invoice and entire set of negotiable ‘on board’ bills of lading made out to the bank” (R. 7), and that “payments were made against the letter of credit on December 7, 13 and 27, 1943” so that by the latter date, the Cuban Corporation had been “paid” in accordance with the terms of said letter of credit (R. 8).

itself of control, had obligated itself to ship the property according to the terms of the agreement of October 7, and apparently had no further rights nor expectations except to be paid. Despite its self-serving declaration of its role, clearly Login was acting in the capacity of buyer and not agent. It is pertinent here to note that the alleged consignment on agency agreement contained no provisions permitting Login to withdraw in the event it had failed to secure purchasers. The liability on Login's part was absolute and leaves no doubt that, in such a contingency, Login would have been contractually bound by the "sale" it asserted in its confirmation.

That the parties themselves were not led astray by formal recitals is doubly clear from the terms of as well as the circumstances surrounding the procurement of the letter of credit. Contemporaneously with the sale of October 7, Login arranged for the financing by the Bank of California (R. 6). This agreement was not made by the bank with Login "as agent", for the record states that "Login recognized the Bank's * * * ownership * * *" etc. (R. 7); the obligations and liabilities secured thereby were Login's not its principal's, nor even Login's in a representative capacity; and upon collection of the amounts of sale, Login repaid the Bank (R. 8).

It has long been recognized in the import trade that activities of the above nature are those of an importer and not of selling agent. Thus, Amendment No. 2 to the Maximum Import Price Regulation of February

29, 1944 (9 F.R. 2350)³ contained a section specifically aimed at preventing importers from evading the Maximum ceilings through the guise of agency and classes them as independent buyers where they undertake the credit arrangements. The statement of considerations contemporaneously issued with the amendment as required by law⁴ explains that this limitation corresponds with interpretations of the term "selling agent" previously made by the Office of Price Administration, and also that the trade considers the de-

³"(b) *Purchases through agents of foreign sellers.* Notwithstanding that a person in the continental United States is considered the selling agent of the foreign seller by the parties to the transaction, he shall not be deemed the selling agent of the foreign seller under this section if he * * * finances the transaction in any manner, or assumes any of the credit risks, or if he determines the selling price. In any such case he shall be deemed to be the importer under this regulation."

⁴*Statement of consideration:* The regulation as originally issued provided that the purchase made by a person through the selling agent of a foreign seller was exempt from price control. The term "selling agent", not having been defined, has been construed by some persons in the trade to include those who sell on a C & F or CIF basis to the importer of record. In many cases the person making the sale was an independent buyer and not the selling agent of the foreign seller.

In order to correct this practice, the regulation has been amended to limit the term "selling agent" to a comparatively narrow class. The amendment specifically removes from the category of "selling agent" anyone who invoices imported commodities in his own name without disclosing that he is acting as agent for a foreign seller, or who finances the transaction in any manner and thus assumes the credit risks, or who determines what the price shall be. These limitations are placed in the amendment for the reasons that they correspond with interpretations in the term "selling agent" previously made by this Office and also because *the trade considers the described functions to be the proper functions of an imported (sic) and not of a mere agent.* Thus any person performing any of these functions is considered the importer under the regulation, even though he is treated as an agent by the parties to the transaction (Pike and Fisher, OPA Service, par. 21, p. 159). (Italics added.)

scribed functions to be the proper functions of an importer or buyer and not of a mere agent.

Without reference to the Amendment however, it is clear that in the transactions of October 7, Login acted as a buyer from the Cuban seller, and that in those of December, it acted as seller. It is elementary that a contract,—including one of sale—requires two contracting parties. In Appellant's Brief (App. Br., p. 11) it is stated that Login's "relationship in law was that of agent to the purchasers, and to its principal, the Cuban Corporation." It seems tautological to comment on the legal impossibility of being agent to purchasers who did not exist. It is equally patent from the record that after the transaction of October 7, no further negotiations were had between Login and the Cuban importer. The conclusion follows irresistibly that there were none further because none were necessary; that the foreign importer had with binding effect "sold" and that Login had with equally binding effect "bought".

As has been stated, circumventions in one guise or another appear often where certain business practices have been drawn with a view to enabling the parties to "run with the hare" or "hold with the hounds" according, as in the exigencies of a given case, their interests may dictate: *Ferry v. Hall*, 188 Ala. 178. But they cannot make a sale and at the same time constitute the buyer simply an agent of the seller to hold the property until some further act is accomplished: *Ferry v. Hall*, *supra*. No matter how such contract

may be styled, the arrangement does not suffice to remove the controls imposed by public policy.

The courts have on numerous occasions enforced the rule that the particular form in which the parties have cast a transaction will not prevail when, but for that form, it is subject to the condemnation, regulation, or other application of a statute or declared public policy: *Taylor v. United States*, 142 F.2d 808, (C.C.A., 9th) cert. den. 323 U.S. 813; *United States v. City and County of San Francisco*, 310 U.S. 16, 60 S.Ct. 749; *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 54 S.Ct. 767; *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 50 S.Ct. 169; *Strauss v. Victor Talking Machine Co.*, supra. The courts look beyond mere names and within to see the real nature of the agreement and determine its legal character and effect from all its provisions taken together, and not from the name that has been given to it by the parties, or from some isolated provision: *Standard Fashion Co. v. Magrane-Houston Co.*, supra; *Banker Bros. v. Pennsylvanit*, supra. They will not permit the parties, by designating the transaction as a consignment for sale, to use it as a cloak or device to disguise the real character of the transaction: *Chickering v. Bastress*, 130 Ill. 206; *McGaw v. Hanway*, 120 Md. 197. Particularly is this true where the arrangement, if allowed, would have the effect of subverting an important public policy, solemnly declared by the legislature and requiring incessant vigilance by those charged with its operation. Thus in *U. S. v. Masonite Corp.*, 316 U.S. 265, 62 S.Ct. 1070, a prosecution under the

Sherman Act, the court stated that a so-called del credere "agency" did not "necessarily control when the rights of others intervene, whether they be creditors or sovereign" and held that "the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade" (62 S.Ct. 1078).

Similarly, in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, supra, the contention was that certain agreements were "Retail Agency Contracts" of consignment for sale and not outright sales. The lower court, quoted with approval in the opinion by Mr. Justice Hughes (31 S.Ct. 380), rejected this contention and held it "an effort to 'disguise the wholesale dealers in the mask of agency, upon the theory that in that character one link in the system for the suppression of the "cut rate" business might be regarded as valid,' and that under this agreement 'the general jobber must be regarded as the general owner, and engaged in selling for himself, and not as a mere agent of another.'" The same reasoning was followed by the court in *Banker Bros. v. Pennsylvania*, supra, upholding the validity of the imposition of a state sales tax levied upon a consignment transaction claimed to be merely an agency.

The rule has been followed in cases dealing with the Emergency Price Control Act, where other devices have been brushed aside. In *U. S. v. Weiss*, 150 F.2d 17 (cert. den. 65 S.Ct. 45), the contention was that the defendant was only a "finder" and not a seller.

The court held him a seller and affirmed his conviction. In *Taylor v. U. S.*, supra, the court looked through the converse situation where the claim was of a sale. In *U. S. v. Steiner*, 152 F.2d 484, the court held that a purported lease was (152 F.2d 487):

“* * * Simply a vehicle for the circumvention of the law and the transaction was, in reality, a sale—not a lease—and the price received was over and above the maximum or ceiling price * * *”

In *Schreffler v. Bowles* (C.C.A., 10) January 12, 1946, (not yet reported), the appellants defended a treble damage action on the ground that they were not engaged in purchase and sale “but were merely acting as the servants of the various concerns with whom they were dealing.” Rejecting this contention, the court held that examination of the facts “exhibits a clear intent to evade the maximum price regulation by way of ‘commission, service, or otherwise.’ The gravamen is the evasion of a price limitation by direct or indirect methods, and this the parties may not do.”

The broad objectives of the Emergency Price Control Act aimed at avoidance of the inflationary spirals are expressed as commandingly in the regulations dealing with lobster as in those dealing with other facets of the national economy. The perils foreseen by Congress define the scope of the administrative regulation and conduct enjoined. One may act as an importer under his own ceiling; or he may legitimately act as selling agent for a foreign importer. He may not however buy in the foreign market and later sell at prices in excess of his own ceilings through the

medium of formally inserting "as agents" in his subsequent sales contracts. To permit such to be done would inevitably result in complete nullification of what was by Congress deemed an important part of the price structure.

The fact that Login's profit from these sales amounted to but a percentage commission is immaterial. Its retention or regaining of a competitive advantage over other importers who were limited by their ceilings; the advantages accruing to it directly as well as the intangibles of good will or other inducements deemed important by it and not necessary to be explored herein, sufficiently dispose of that issue. Moreover, it needs hardly to be suggested that the operation of price ceilings in no wise depends upon the amount of profit secured by their violation.

II.

THE STIPULATED FACTS HEREIN PRESENTED A QUESTION OF LAW FOR THE COURT, AND NOT ONE OF FACT FOR THE JURY.

The purpose of federal pre-trial procedure is to facilitate trial by elimination of issues not really in dispute. Under Rule 16 the court properly issues an order reciting the issues left for trial. The parties having stipulated as to all the material facts, the sole issue left was whether from the facts shown the legal status of selling agent was made out, and the resolution of this question was for the court, not the jury. Federal Rule 16 establishes a mechanism for summary

determination of whether any conflicts of fact remain for submission to a jury. In so doing the court does not, as Appellant mistakenly insists in its brief, deprive the parties of their right to jury trial guaranteed by Article VII of the Constitution. The court is not passing on weight, credibility, or sufficiency, but on the legal significance of admitted evidence. It is the sole province and function of the trial court, and not of the jury, to determine the legal effect of undisputed evidence: 64 *C.J.* 341.

Questions whether facts do or do not constitute a sale, and who is bound by an instrument are for the court and not the jury: *Gohen v. Kehoe*, 71 Ill. 66; *Kendall Boot etc. Co. v. Bain*, 46 Mo. App. 581; *Thomas v. Presbrey*, 5 App. (D.C.) 217; 64 *C.J.* 336. "The existence of agency may often be a question of fact requiring submission to the jury; not so when the contract is in writing and there is no dispute or room for disputed inference as to the other documents, correspondence, and acts which might sometimes bear upon construction." *Texas Co. v. Rice*, C.C.A. 6, 26 F.2d 164, cert. den. 278 U.S. 640, 49 S.Ct. 34. Where there is no dispute as to the facts, the construction of a contract of sale to determine the rights and obligations secured thereunder are for the court and not the jury: *Colonial Ice Cream Co. v. Interocean Mercantile Corp.*, 296 F. 316.

The facts as to Login's activities in connection with the ordering of lobster and its subsequent transfer to buyers in San Francisco being admitted, the court would have been required to submit the cause to a

jury under binding instructions and to have set aside a verdict in favor of the defendant. It is said in *Slocum v. New York Life Insurance Co.*, 228 U.S. 364, 33 S.Ct. 523:

“When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.”

Since, as said above, the law is settled that one cannot be both agent to sell and an independent buyer in the same transaction, the question is not whether Login in fact purported to act for the Cuban importer but the qualitative effect of its acts in law. That was the preliminary question for the court to consider and which was properly determined. The decisions establish the reasonable rule that:

“* * * in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.” *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasants v. Fant*, 22 Wall. 116; *Gunning v. Cooley*, 281 U.S. 231, 50 S.Ct. 231.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

Dated, San Francisco, California,

March 27, 1946.

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No. 11,151

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE LOGIN CORPORATION (a corporation),
Appellant,

VS.

CHESTER BOWLES, Administrator, Office of
Price Administration,
Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN,
CLERK

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THE LOGIN CORPORATION (a corporation), <i>Appellant,</i>
vs.

CHESTER BOWLES, Administrator, Office of Price Administration, <i>Appellee.</i>

APPELLANT'S REPLY BRIEF.

Counsel for the Price Administrator contend that the evidence stipulated to in the trial Court presented no question of fact as to the issue to be determined there—whether Login had acted as selling agent or whether it had acted in its own behalf as an independent seller. The Administrator contends, as he is obliged to by the ruling of the trial Court, that Login, as a matter of law, could not be held the selling agent.

Although the Administrator prior to the sales in question had not seen fit to define, for the guidance of the trade, what he regarded as necessary to qualify one as a “selling agent”, he supports his position by advancing reasons why Login can not now be held one.

These, on analysis, reduce themselves to the following three:

1. (At pages 3 to 8 and at page 10 of its brief.) Login sold the 334 cases after it had arranged with the principal to have all of the 1250 cases shipped. One can not sell goods as an agent if he sells them *after* he had arranged for the principal to ship them. This is not the law.

2. (At pages 8 and 9 of its brief.) Login arranged an advance to its principals of \$17.00 per case of the \$23.50 per case sales price. One can not be an agent if he has arranged an advance of part of the purchase price to his principal. This is not the law. (The amendment to the Import Regulation quoted was not in effect at the time of the transaction.)

3. (At pages 10 to 14 of its brief.) The third point while obscure seems to be that Login although forthrightedly a sales agent as to 916 cases of the shipment, as to the remaining 334 cases was "circumventing" and using a "cloak or device" to "disguise" its true character so as to enable it to "run with the hare" and "hold with the hounds", and thus evade the price regulation.

There is no evidence of evasion. If there were, it at most raised a question of fact as to whether Login was in good faith in acting as a seller's agent. This was a question for the jury.

Each of these points is now considered in detail:

APPELLEE'S FIRST POINT (pages 3 to 8 and page 10 of its brief.)

The appellee points out that Exhibit E (Tr. page 13), the confirmation of sale to the Cuban corporation, is dated October 7, 1943, whereas the stipulation recites that the orders for the 334 cases of lobsters were taken in December, 1943. From this appellee concludes that Login—as a matter of law—could not have made the San Francisco sales as an agent.

Appellee makes this argument despite the fact that he has stipulated that Login, who was admittedly primarily a sales agent, admittedly acting as such in regard to the balance of the carload of lobster, had this part in the sales in question:

“It therefore notified a local food broker that although Login could not import and sell lobster because of its ceiling, if buyers had ceilings that permitted them to do so, and wished to import lobster,—Login could arrange the purchase from its principal in Cuba. The broker was notified that Login could act only as sales agent.” (Tr., page 5.)

This is not merely Login's *claim* of what occurred. Appellee stipulated *it did* occur. Further he admits, not only that Login so advised the broker, but he stipulated, without qualification, that this *was* the manner in which the sales *actually were made*:

“On this basis orders were taken in December, 1943, for 334 cases of lobster through the local broker.” (Tr., page 5.)

The reasoning of counsel for appellee on this point is that the formal sales of the 334 cases were made

after the confirmation of sale on October 7, 1943, therefore the October 7, 1943 transaction must, as a matter of law, be a purchase by Login of the 334 cases. This result does not follow. It is not the law. Counsel's error is to assume that if a purchaser had not already bought the 334 cases the only alternative was that Login bought it in its own behalf. As counsel states at page 10 of its brief:

"It seems tautological to comment on the legal possibility of being agent to a purchaser who did not exist."

We agree that being an agent *to* someone not in existence is a difficult concept. However, it is eminently possible—legally and factually—to be an agent (as Login was) for one's principal (the Cuban corporation) for the purpose of selling to purchasers (the San Francisco purchasers) who do exist, although not then defined.

Contrary to counsel's view there is nothing strange about being an agent for a seller even though the purchaser is not presently identified.

Rather, it is the normal situation. The primary activity of most sales agencies is to find purchasers not presently known.

Nor is there anything impossible—legally or factually—in an agent's ordering goods for delivery from its principal, and even receiving them, before resale to the ultimate consumer takes place. It is common knowledge and we think one of which the court will take judicial notice that this is true, for instance,

in most sales of farm produce by commission merchants and factors, by many dealers in automobile and farm machinery and in the case of all agents who receive merchandise on consignment for sales. In all such transactions title remains in the seller and the fact that the agent has received the goods in no way terminates his agency:

“The averment of the complaint is that the automobile was received by the defendant under a contract whereby the defendant was to hold the property on consignment, and, when the automobile was sold, to forward to the Motor Company the sum of one thousand five hundred dollars. There is thus alleged not a contract of sale, but one which made the defendant the agent of the plaintiff’s assignor to sell the automobile. The word ‘consignment’ does not imply a sale. The very term imports an agency, and that the title is in the consignor.” (*Cass v. Rochester*, 174 Cal. Rep. 358, 363, 163 Pac. 212.)

Consequently, we say counsel for appellee is in error in stating that because the San Francisco purchasers were not identified on October 7, 1943, Login could not thereafter sell as an agent—and that this necessarily follows as a matter of law. It may well be that the confirmation of sale, Exhibit E, is technically in error in confirming a sale of the entire 1250 cases and that the formal sale of the 334 cases took place while the shipment was in transit. However, we submit that the resulting situation is entirely consistent with the agency relationship established by the facts stipulated to.

Appellee has stipulated that as to the other 916 cases Login was acting as sales agent for the Cuban Corporation; that Login normally is a sales agent and that from the outset its only action in regard to the 334 cases sold in San Francisco was to state that it, as agent, could arrange for the purchase of them by buyers whose ceiling permitted them to handle them. That in fact they were ordered on this basis, is admitted.

Counsel's statement in this connection at page 10 that "it is equally patent from the record that after the transaction of October 7, 1943, no negotiations were had between Login and the Cuban importers" is not true. As is indicated on pages 8 and 9 of the transcript when the purchasers finally paid Login in February or March, the remaining \$6.50 per case due to the Cuban Corporation was fully accounted for by Login to its principal in Cuba, less proper charges and Login's commission of \$1.17 per case. Likewise appellee's statement on page 6 indicating that Login as agent never placed an order for delivery of goods unless it had already sold them is we submit an unfair inference as will be demonstrated by a reading of the stipulation on that point.

There is no evidence in the record that Login purchased the 334 cases for its own account; that it ever at any time acted as the purchaser of them; that it ever asserted property rights on them or that they were handled in any manner different from the balance of the cases as to which was admittedly a sales

agent. Certainly it acted as and was, an agent in regard to its principal in Cuba and certainly acted as and was an agent in regard to the San Francisco purchasers.

The effect of the October 7, 1943, transaction, is not in conflict with these facts and all of them together, we submit, show, as a matter of law, that Login was a selling agent. If this Court should hold Exhibit E to raise some different inference, the most that can be said is that it should be submitted to the jury, under proper instructions as to its legal effect, with the other facts stipulated to, for determination of the question whether Login had acted as selling agent, or as an independent buyer. *It does not*, as a matter of law, prevent Login selling the goods as agent.

It may be well to again point out here that in this latter regard, the question before the Court is not whether there are any facts in the record which support a trial Court finding that there was no agency. Rather the question is whether there are any facts at all which would support a contrary finding. We submit that to read the record is to answer this question; it must be obvious that a finding that Login had acted as agent would be supported by the facts.

In either event, the trial Court's ruling, as a matter of law, was in error.

APPELLEE'S SECOND POINT. (pages 8 to 9 of its brief.)

Appellee's point here is that because Login arranged an advance to the Cuban Corporation of \$17.00 of the sales price of \$23.50 per case it, as a matter of law, could not act as a selling agent. Not only is this not the law but it is well settled that agents in fact do in many ways finance their principals or guarantee payment to the principals of the purchase price of the goods they sell for them.

The financing of a principal, in one way or another, is recognized by the law of the State of California as a proper function of an agent which in no way changes his status as agent or his obligations to his principal. This has long been the law in regard to such financing as direct advances of funds by a sales agent to his principal and in regard to a guarantee of payment of sale price, made by the agent to the principal:

Thus, in *Belmont v. Milton* (1941), 43 Cal. App. (2d) 120, 110 Pac. (2d) 525, the appellant was a consignee of the respondent for the marketing of oranges under a marketing agreement. He brought suit for advances made to his principal, the grower. In passing upon the propriety of allowing interest on the advances the Court at page 125 of Cal. App. (2d) said:

"The court should have allowed interest on the advances made by appellant to respondent. We can only construe these advances as a loan, which, under the provisions of section 1914 of the Civil Code, bears interest. * * * The contract was not one of sale, but of consignment. Nor was appellant a del credere factor. Therefore there was

no money due respondent from appellant, until the first returns were received from the sale of oranges, and any advances made, were received from the sale of oranges, and any advances made, were in the nature of a loan, and in the absence of an agreement to the contrary, would bear legal interest. A factor, who is not a del credere factor, is entitled to interest on advances made. (25 Cor. Jur. p. 384, sec. 83; Imperial Valley etc. Assn. v. Davidson, 58 Cal. App. 551 (209 Pac. 58).)''

Again, in *Iwata v. Goldberg* (1927), 81 Cal. App. 304, 253 Pac. 331, the plaintiffs sued to recover damages under a contract whereby they had consigned cantaloupes to the defendant for sale. The plaintiffs contended the contract was one of sale. Advances were made to the plaintiff by the defendant under provisions of the contract providing that the plaintiff could draw at sight upon the defendant for the cost of each carload of cantaloupes shipped. In affirming the judgment for the defendant the Court said:

“The contract, as we look upon it, was not a sales contract, but was a contract for consignment of merchandise by principal to agent. (2) There was a promise on the part of the consignees to honor drafts drawn by the consignor, on account of each carload shipment, for an amount not less than the stated estimate of cost. In accounting for the sale of each such shipment, the consignees were to deduct and retain the amounts advanced ‘on account of price guarantees’. But there is not in the contract any definite or intelligible certain guaranty of price, or warrant by con-

signees that consignors should go without loss on any one of these shipments, or even on all of them together. Nevertheless, the consignors, plaintiffs herein, seek to recover on such supposed guaranty as a separate guaranty of the cost of each shipment, independent and apart from any other. So it is attempted here to compel the consignees to pay the amounts of said drafts covering estimated costs of the last eleven carloads, notwithstanding the fact that the defendants (although they did not make any advancements on these eleven carloads), have in fact accounted to plaintiffs for all sales of the merchandise shipped, and that the aggregate sum thus received leaves in the hands of the plaintiffs all of the net profits of the entire transaction."

Likewise, in *Cooper v. American, etc.* (1934), 137 Cal. App. 494, 30 Pac. (2d) 558, the plaintiff sued to recover damages for the alleged breach of contract by the defendant whom she had appointed her exclusive selling agent for fruit grown on her lands. The defendants made cash advances to the plaintiff. In ruling upon the appeal the Court stated:

"That the parties hereto occupied the relationship of factor and principal cannot be disputed (sec. 2026, Civ. Code; *Betts v. Southern California Fruit Exchange*, 144 Cal. 402 (77 Pac. 993), and regardless of any advance to the plaintiff, it is the duty of the factor to obey the instructions of the principal. (Sec. 2027, Civ. Code.)"

And again in *Moulton v. Williams, etc.* (1932), 218 Cal. 106, 21 Pac. (2d) 936, suit was brought on

behalf of certain growers to recover on a bond for violation of a contract whereby grapes were consigned to the defendant for sale with a \$15.00 per ton guarantee to the growers by the defendant consignee. The sales failed to realize the amount guaranteed and suit was brought. It was contended by the defendants that the transaction was in effect a sale. The Court said at page 109 of 218 Cal. Rep.:

“We are unable to come to any other conclusion than that the failure of the corporation to account to the growers to the extent of \$15 per ton for their grapes was a clear violation of the terms of the act. The contract was one of consignment and not a sale. The presence of the guaranty did not alter its essential feature. Title to the goods did not pass until sale was made by the factor. (Pugh v. Porter Bros., 118 Cal. 628 (50 Pac. 772.)) The guaranty was but an inducement to the grower to enter into the contract.”

Indeed, as the cases indicate, the *statutory* law of the State of California, in dealing with one of the oldest established forms of sales agency—that of principal and factor—recognizes financing of a principal by its selling agent as a proper function of the agent. Thus the Civil Code, which provides in Section 2026 that a factor is an agent who in the pursuit of an independent calling is employed by another to sell property for him, expressly provides in Section 2027 that he is still obliged to obey the instructions of his principal notwithstanding any advances he may have made to the principal, and provides in Section 2029 that a factor, who charges a commission for guaran-

teeing the payment of the sale price, does not thereby assume additional responsibility for the safety of his remittance of the proceeds although he is liable for the payment of the price when due. These sections have been law since the enactment of the codes since 1872.

It should be pointed out that *nothing* in the Maximum Import Price Regulation or those which preceded it or in the Statements of Considerations issued with them by the Office of Price Administration *excluded from the term "selling agent"*, as used in the regulation, *an agent who financed his principal*. Although counsel does not expressly point it out, Amendment, Number Two, to the Maximum Import Price Regulation cited on page 9 of its brief was not in effect at the time of the transaction in question. What counsel attempts to do here is to make its amendment work retroactively and to apply its restricted definition to a transaction occurring prior to its date. Despite the fact that the administrator had issued no definition of selling agent whatsoever, it now attempts to exclude Login from its meaning for exercising functions long recognized by law and the trade as proper functions of an agent.

APPELLEE'S THIRD POINT. (pages 10 to 14 of its brief.)

It is difficult to determine the precise argument here made by the counsel for the price administrators. It apparently is that the Login's actions in selling the 334 case portion of the carload were a "subterfuge",

or "disguise" enabling it to avoid the price regulations.

We point out at the outset that there is no evidence of evasion in the record. The facts indicate the opposite. Login discontinued importing lobster to observe its ceiling; it offered as agent to secure it for those whose ceilings permitted it to import it. Six months earlier it has revealed an almost identical transaction to the Office of Price Administration Counsel. The Price Administrator has stipulated these facts are true, and can not, we submit, point to any facts justifying a charge of evasion. Further he stipulated that if any violation occurred it was not willful nor even the result of failure to take practicable precautions. (Tr. pages 17, 18.) Also it may be noted that the trial Court refused to issue an injunction enjoining any violations by the appellant. (Tr. page 19.)

The appellee cites numerous cases on pages 11 and 12 of its brief. These decisions have no bearing on the problem before the Court.

Taylor v. United States, 142 F. (2d) 808, decided by this Court, is an affirmance of the judgment entered against the defendant following a verdict of the jury in a criminal charge brought for violation of the emergency price control act.

Strauss v. Victor Talking Machine Co., 243 U. S. 490, 37 Supreme Court 412, is not in point. The Court there held, and properly, that a scheme of distribution disclosed by a so-called "License Notice" was a violation of law as an attempt to control the prices of articles sold.

U. S. v. Masonite Corp., 316 U. S. 265, 62 Supreme Court 1070, is we submit of no more assistance. The Supreme Court there held that the agreements involved were valid agency agreements:

“We assume in this case that the agreements constituted the appellees as del credere agents of Masonite.”

The holding of the case is that the agreements even though they are valid as agency agreements, nevertheless violate the Anti-trust Act because they are in restraint of trade.

Other cases cited enunciate the general rule that the terms used in a contract can not outweigh the effect of overt acts and conduct obviously contrary to the terminology used in the contract.

In the case before the Court we submit there is nothing in the exhibits of which counsel complains inconsistent with Login's actions as agent, or with its conduct regarding either its principal or its purchasers. The rule cited in these decisions therefore has no bearing on this case.

However, even if it be conceded that there is some inconsistency between the two written exhibits and the facts stipulated to the law required the Court to advise the jury of the legal effect of the documents and submit to it for determination from this and all of the facts the question whether Login was acting as an agent or was acting in its own behalf.

In this regard it is interesting to note that the three cases cited by appellee as applying the principle for which he contends and involving the Emergency Price

Control Act all reveal that the questions were not ruled upon as a matter of law by the trial Court but were submitted to the jury:

Taylor v. U. S. (supra), as has been pointed out involved an affirmance of a judgment rendered after a jury verdict.

In *U. S. v. Wise*, 150 Fed. (2d) 17, the Court affirmed a judgment rendered after a verdict of a jury finding the defendant guilty of violating the Act. Counsel has cited this case to the Court because of the manner in which the defendant's contention that he was a "finder", not a "seller", was dealt with. The manner in which it was dealt with is illuminating. The Court charged the jury that if he were a finder he could not be convicted, and as the Appellate Court states this contention that he was such "was not conclusive upon the jury, and it was their duty to interpret it for themselves."

Likewise in *U. S. v. Steiner*, 152 Fed. (2d) 484, from which appellee has quoted, reliance was had by the defendants upon an alleged ten year lease of farm machinery in which the entire rental for the ten year period was required to be paid at the time the lease was signed. The decision says in part:

"As stated by the defendants in their briefs, 'the evidence on every material fact was wholly undisputed as to each of the transactions claimed to constitute the offense * * *'"

The trial Court submitted the entire matter to the jury instructing them as to the legal effect of the lease. The Appellate Court in approving this procedure states:

“It was the duty of the court to construe the legal effect of the written instrument designated as a lease. * * *”

* * * * *

“This instruction was given by the court of its own motion in cause No. 8818, and it properly left to the jury the question of the good faith and wilfulness of the defendant in each appeal.”

It is appellant's position here that there is no evidence of evasion in the instant case, and that on all the facts Login was a selling agent as a matter of law. However, if as is contended by the appellee the documents of which it complains do raise some inference of evasion, we repeat that the proper procedure for the trial Court was to submit to the jury the entire question as was done in the cited case, with proper instructions as to the legal effect of the documents.

In either event the ruling of the trial Court deciding that Login, as a matter of law, was not a selling agent, is error.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
April 3, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,

Attorneys for Appellant.

No. 11,151

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE LOGIN CORPORATION (a corporation), VS. CHESTER BOWLES, Administrator, Office of Price Administration,	<i>Appellant,</i> <i>Appellee.</i>
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APPELLANT'S PETITION FOR A REHEARING.

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FILED

JUN 21 1946

PAUL P. O'BRIEN,

CLERK

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CHESTER BOWLES, Administrator, Office of
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Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Francis A. Garrecht, Presiding
Judge, and to the Honorable Associate Judges of
the United States Circuit Court of Appeals for
the Ninth Circuit:*

THE REASONS FOR THIS PETITION.

The Court has refused to determine the only question presented to it by the parties in the agreed statement and stated by them to be the *one* question at issue. Instead it has affirmed the judgment by deciding another question which was not before the Court under Rule 76, and which the parties agreed imposed no liability on appellant.

The Court's decision holds that two facts appearing in the record bring the sales in question within price control. This is directly contrary to the record.

The two grounds relied upon by the Court, having been excluded from the issues by the parties, were not raised, or at issue, in the lower Court; were not presented or agreed by the briefs on appeal; and were not raised by this Court at oral argument.

Consequently, the appellant has never had the opportunity, either in this or the lower Court, to be heard on the grounds on which judgment is being entered against it. This petition is its first and only opportunity to present its views.

For these reasons this petition is filed. Relying upon the fairness of the Court, we trust it will be accorded the same attention as an appellant's opening brief.

SUMMARY OF GROUNDS ON WHICH REHEARING IS ASKED.

1. The Court's ruling that regardless of whether appellant was a selling agent, certain facts bring the sales within price control is contrary to the record, the agreement of the parties, and the theory of the case in the lower Court.

2. The opinion erroneously states the first fact on which it relies, namely, the time the lobster was imported into the United States. The opinion erroneously states the record shows that the arrival *preceded* the sales. The record does *not* show this.

3. The opinion erroneously construes the exemption of the Maximum Import Price Regulation to require a purchase to be by a person dealing directly with an agent whereas the Regulation itself plainly does not do so. Other official statements of the Price Administrator show the Court's construction to be incorrect.

4. Where the parties present an agreed statement as the record, the Court should decide the question submitted to it by the parties as the only point in issue. It has not done so here.

ARGUMENT.

I.

THE COURT'S RULING THAT REGARDLESS OF WHETHER APPELLANT WAS A SELLING AGENT, CERTAIN FACTS BRING THE SALES WITHIN PRICE CONTROL IS CONTRARY TO THE RECORD, THE AGREEMENT OF THE PARTIES, AND THE THEORY OF THE CASE IN THE LOWER COURT.

The Court has never had called to its attention, and has entirely overlooked, that portion of the record on appeal showing that the sales in question were not subject to price control if appellant was a selling agent. Its decision that "regardless of whether or not appellant was the selling agent" the General Regulation was applicable, is directly contrary to it.

The complete record was not brought up in this case. Instead, an agreed statement, under Rule 76 was presented as the record. It contains (Tr. pp. 3-10) specific facts dealing mostly with the question of agency (the

Stipulation of Facts agreed upon in pre-trial conferences); and (Tr. pp. 14, 15) a general statement of fact, agreed upon in the preparation of the record on appeal, that the transaction was not subject to price control, if appellant was a selling agent.

This “general” statement of fact that the transaction was not subject to price control in this event is equally important with the more specific stipulation—perhaps more so to this Court because it was prepared as part of the record for this Court to enable it to determine this appeal. For this purpose the parties agreed that this was the fact:

“If they were such (purchases by persons dealing with a selling agent), *the transaction* (the sale of the 334 cases) *was not subject to price control.*” (Agreed Statement, Tr. pp. 14, 15—matter in parentheses and emphasis ours.)

The ruling of this Court that,

“* * * regardless of whether or not appellant was the selling agent of a foreign seller, the General Regulation was applicable.”

is directly contrary to the facts agreed upon by the parties.

For this reason alone, we submit, this petition should be granted and the case decided upon the only question submitted to the Court, and the only one on which the liability of the appellant depends—namely: Did the lower Court err in ruling as a matter of law that appellant was not a selling agent?

There is no doubt that the record as quoted speaks the understanding of the parties, and that the proceedings in the lower Court and in this Court were to resolve the one and only question it presented—namely: Was appellant a selling agent?

Until the handing down of this Court's decision this has been the only issue in this case. If appellant was a selling agent, the parties were agreed that the facts did not bring the transaction within price control.

The question was not whether the dealing with a selling agent was direct or indirect, or when the lobster arrived in the United States. These facts were not in issue, because they were covered, and excluded from consideration, by the agreement that there was no liability if appellant was a selling agent.

That the only issue in this case was that raised by the record as quoted is clear beyond question from the acts of the Price Administrator. The Administrator has never questioned appellant's statement of the point at issue in the lower court (Tr. p. 20):

“(a) * * * the question to be determined by the trier of fact in the lower court was whether, as to the 334 cases of lobster, these were purchases by persons who dealt with the ‘selling agent’ of a foreign seller within the meaning of the Maximum Import Price Regulation.”

The Administrator's brief states at page 3:

“The issue is * * * (App. Br. p. 5), whether these sales in December were made by Login as an independent seller * * *, or were made by Login as selling agent of the foreign seller * * *”

and again at page 14:

“The parties having stipulated as to all the material facts, the sole issue left was whether from the facts shown the legal status of selling agent was made out, * * * and the resolution of this question was for the court, not the jury.”

It was toward the resolving of this issue that the parties stipulated as to the facts regarding it. They did not stipulate to facts surrounding other questions not at issue, whether for instance the sales were made after the arrival of the goods—the best evidence of which perhaps is the fact that the stipulation, otherwise detailed, does not even mention the day or month of arrival of the goods in this country; nor state whether it preceded or succeeded the sales.

It was on this issue that the pretrial conferences and arguments were had, and it was on this issue that the Court ruled and finally entered judgment against the appellant.

It was on this agreement, stated in the record as quoted, that this appeal was taken by appellant. It was because the Price Administrator agreed to its incorporation in the agreed statement that the record is presented in this fashion, rather than the complete record covering all the proceedings in the lower Court. It meets the issue raised by the agreement of the parties as to the facts—not other issues not in question.

The appellee could not now, and *indeed its brief does not* contend that other issues were at stake and that the appellant has failed to establish them. Nor

could appellant, had judgment been in its favor, contend on appeal by the Price Administrator that he had failed to prove other issues.

Neither, we submit, under well settled rules of law, should this Court affirm a judgment in favor of appellee upon such grounds, contrary to the agreement of the parties as to the facts, and the understanding upon which the case proceeded in the lower Court and on appeal:

“And all the way through the procedure, to judgment, the case was tried upon that theory. At no time did plaintiff suggest or intimate the theory upon which he now relies, * * * and now to affirm a judgment for a reason apparently never thought of by the lower court or either party to the controversy would hardly be consistent with the spirit of modern judicial administration. Very generally is applied the rule that a theory accepted and acted upon by all in the trial court cannot be repudiated in the appellate court. *Peck v. Heurich*, 167 U.S. 624, 17 S. Ct. 927, 42 L. Ed. 302; *Westlake Merc. F. Co. v. Merritt* (Cal. App.), 262 P. 815.”

Sacramento Co. v. Melin (C.C.A. 9), 36 Fed. (2d) 907.

To do so, we submit, is to render judgment against the appellant because of alleged failure to prove facts which the appellee who brought the action agreed were not in issue and did not establish liability. It is to hold that two facts in a stipulation directed primarily to the agency aspect of the transaction bring the case within Price Control *when the Price Adminis-*

trator itself has agreed the actual fact is that the entire transaction—not only so much of it as is shown by the stipulation, but the transaction as it occurred in fact—was not within price control if the appellant was a selling agent. It in effect, is to render judgment against the appellant on facts which the Price Administrator has agreed with appellant did not subject him to judgment.

The truth of this statement is shown by appellee's own position in its brief, contrasted with the language of the opinion of the Court. The opinion states:

“It, the Maximum Import Price Regulation, does not, as appellant seems to think, except from the provisions of the General Regulation all sales made by selling agents of foreign sellers. * * * Hence regardless of whether or not appellant was the selling agent of a foreign seller, the General Regulation was applicable.”

But the Price Administrator *agreed* that the actual fact in *this* case is that the General Regulation *was* not applicable, and the Import Price Regulation *did* exempt *these* sales if *this* appellant was a selling agent. It has so stated in the agreed statement on appeal:

“If they were such (purchases by persons dealing with a selling agent), *the transaction* (the sale of the 334 cases) *was not subject to price control.*” (Agreed Statement, Tr. pp. 14, 15—matter in parentheses and emphasis ours.)

and in its brief, page 3:

“*The issue is, as stated in Appellant's Brief (App. Br. p. 15), whether these sales in December were*

made by Login as an independent seller—in which case the sales were subject to, and because in excess of its ceilings in violation of, the General Maximum Price Regulation; or *were made by Login as selling agent of the foreign seller—in which case they are covered by the Maximum Import Price Regulation* (8 F.R. 11681) (R. 14, 15) (and therefore exempt from the General Maximum Price Regulation).” (Emphasis and matter in parentheses ours.)

The appellant, we respectfully submit, should not be held liable in damages to the Price Administrator on facts which the Administrator has agreed do not make it liable, if appellant was a selling agent. For the Court to so rule finally, would result in rendering judgment against the appellant upon the grounds it has never had the opportunity of meeting or preparing a record for; going to points which the parties agreed were not in issue and did not constitute liability and depriving it of a hearing on them in the trial Court despite its request for a trial by jury on all issues.

We respectfully submit that a miscarriage of justice will result in this case unless the Court grants a rehearing and decides the case upon the question submitted to it and upon which appellant’s liability really turns.

II.

THE OPINION ERRONEOUSLY STATES THE FIRST FACT ON WHICH IT RELIES, NAMELY, THE TIME THE LOBSTER WAS IMPORTED INTO THE UNITED STATES. THE OPINION ERRONEOUSLY STATES THE RECORD SHOWS THAT THE ARRIVAL PRECEDED THE SALES. THE RECORD DOES NOT SHOW THIS.

The opinion construes the Import Price Regulation language* to require that the goods be imported *after* the sale. Assuming this construction to be correct, it does not in *this* case afford a reason for affirming the judgment.

The Court concludes the lobster here was imported *before* the sale and therefore not within the exception of the Regulation. The reasons assigned by the Court for its conclusion is its statement that the record shows:

1. That it was imported into the continental United States prior to the sale, and
2. Was in the continental United States at the time of the sale.

Neither is correct. The record does not show it was imported before the sale. It does not show it was in the United States at the time of the sale.

The plain truth of the matter is that the record is *silent* on the *date of arrival* of the goods into the

*“Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchase of any commodity to be imported into the continental United States by any person who deals directly with a foreign seller whose place of business is located outside the continental United States or with his selling agent wherever located.” (8 F.R. 11681.)

United States; *does not state the exact date* in December on which the *sales* were completed, and *makes no attempt* whatever to relate *the time of sale to the time of arrival*.

The silence of the record is significant. Of all the facts on which the parties finally agreed, the easiest to determine was the date of importation—had it been deemed material, or at issue. The parties did not stipulate as to these facts because they were not at issue. In *this* transaction, they were agreed, liability did not turn on date of arrival as related to the date of sale. It turned solely on whether appellant was a selling agent.

The closest approach in the record, to the relationship between the two events, is the fact that the goods were shipped in February and March from Florida to California. (Tr. p. 8.) The date of arrival in Florida from Cuba does not appear. The sales, the record shows, were made in December, the exact date not being specified.

This Court therefore is now in the position of affirming a judgment in favor of the appellee for the stated reason that regardless of whether appellant be an agent the facts stipulated to show the lobster arrived before the sale *when the appellee has agreed that in fact there was no liability if the appellant was a selling agent, and the record does not show the lobster arrived before the sales*.

The result is that the Court in effect is allowing judgment to be affirmed against the appellant on a

charge on which it has never had the opportunity to be heard either in the lower Court or here—and this because the appellee agreed, in effect, it was not in issue.

We submit that in simple justice this Court should not affirm judgment against the appellant in favor of appellee on the basis of “facts” which the record does not show, when the appellee itself has agreed on all the facts there is no liability if the appellant be a selling agent.

III.

THE OPINION ERRONEOUSLY CONSTRUES THE EXEMPTION OF THE MAXIMUM IMPORT PRICE REGULATION TO REQUIRE A PURCHASE TO BE BY A PERSON DEALING DIRECTLY WITH AN AGENT WHEREAS THE REGULATION ITSELF PLAINLY DOES NOT DO SO. OTHER OFFICIAL STATEMENTS OF THE PRICE ADMINISTRATOR SHOW THE COURT'S CONSTRUCTION TO BE INCORRECT.

The final reason assigned by the Court for its affirmation of the judgment is that the language of the Import Regulation requires that a purchaser deal directly with the selling agent. The Court's conclusion therefrom that the sales therefore are subject to price control, even though appellant was a selling agent, is again directly contrary to the record and the agreement of the parties that the fact here is that these sales *were not* subject to price control if the appellant was a selling agent.

While it is true that the question at issue as stated by the agreed statement on pages 14 and 15 of the

transcript may technically be broad enough to include the question of whether the dealing with the selling agent was "direct" or "indirect" it is submitted it is apparent beyond any doubt that the sole question at issue was whether appellant was a selling agent; not whether the dealings were direct or indirect, and that if it was a selling agent the sales were not subject to price control. The appellee has never at any time contended to the contrary, and its own statement in its brief at page 3 indicates its complete agreement with this position:

"The issue is * * * whether these sales * * * were made by Login as an independent seller * * * or were made by Login as selling agent of the foreign seller * * *"

The case having thus been tried and the record on appeal prepared on the agreement that the transaction was not subject to price control if Login was a selling agent, it is, we submit, manifestly unfair to affirm the judgment in favor of the appellee even though appellant is a selling agent, on this other ground which the parties have agreed did not impose liability.

All that has been said under the prior heading of the argument applies with equal force here. We do not repeat it here. The appellee itself could not now claim an appeal—and has not—that it could recover judgment, if appellant is a selling agent. It is therefore, we submit, error for the Court to affirm judgment in its favor even though appellant is a selling agent.

However, regardless of the foregoing, the Court, we submit, is in error in construing the language of the

Import Regulation to require that the purchaser must deal *directly* with the selling agent, in order that the sale fall within the exemption.

To properly construe the language it must be considered and analyzed in light of its use in the Regulation by the Price Administrator. This history has not been called to the Court's attention in this connection. It will be here. So analyzed, the language means to say this:

“Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchase of any commodity to be imported into the continental United States by any person who deals:

(1) directly with a foreign seller whose place of business is located outside the continental United States, or

(2) with his selling agent wherever located.”

The word “directly” qualifies the phrase “with a foreign seller”, not the phrase “with his selling agent”. Its function is to emphasize, by contrast, the latter phrase, and make clear that dealings with a foreign seller, not directly, but through his selling agent, are treated the same as dealings directly with the foreign seller, without the intervention of the agent.

The purpose of the language is this: Prior to its enactment, the O.P.A. had limited exemption from price control to purchases made *directly* from a foreign seller. Purchases, indirectly, through his selling agent were not exempt. The O.P.A. then reversed its

position as to selling agents and issued substantially the provision now under consideration (in Revised Supplementary Regulation No. 12) to extend the exemption to dealings with the foreign seller which were "not direct" but made through his selling agent.

Its purpose was *not* to require that dealings with the selling agent be "direct" so as to eliminate dealings through a food broker.

The official statement issued by the Price Administrator when the language was first issued to effect the change makes this clear:

The language was first used in Revised Supplementary Regulation No. 12* issued December, 1942, then governing imports. The meaning of the language is stated by appellee in its statement of considerations issued at the same time in connection with and explaining the Revised Supplementary Regulation No. 12. It stated in part:

"The changes in this revision may be summarized as follows:

1. * * *

2. Purchases of commodities from abroad *from an agent* of a foreign seller in this country *are treated as direct purchases from a foreign seller* and are exempt from the General Maximum Price Regulation * * *"

"On May 21, 1942, shortly after the G.M.P.R. became effective, the O.P.A. announced that the

*"This regulation shall not apply to:

(a) purchases of commodities to be imported by a person who deals directly with the seller or his selling agent wherever located." (Sec. 1499, 1404 Rev. Sup. Reg. No. 12; 7 F.R. 10532.)

price at which goods might be purchased from a foreign seller was not subject to the provisions of that regulation if the domestic importer dealt *directly* with the seller in a foreign country, although the importer's resale in the United States was under the G.M.P.R. That interpretation is now embodied in this revision. *However, the exemption embodied in this revision includes the purchases made through the selling agent of a foreign seller contrary to the prior interpretation publicly issued.* The reason for this change is that it has been established that agents of foreign sellers ordinarily serve only the functions of bringing together the buyer in this country and the seller abroad, and did not have authority to set the price or terms of sale." (Pike and Fisher, O.P.A. Service, paragraph 21, pp. 521, 522.) (*Italics are appellant's.*)

Thus its purpose is that purchases made through an agent be treated the same as purchases from the foreign seller.

The language as used in Supplementary Regulation No. 12 was continued in Amendment No. 1 issued January 1, 1943, 8 Fed. Reg. 611, and was finally incorporated into the Maximum Import Price Regulation as it existed on the date of the transaction in question. It has always had the same meaning.

Perhaps the best evidence that it was always so used is found in the Import Regulation as it was amended immediately after the transaction in question, effective February 28, 1944, clearly indicating that import of the language is that dealings with the

foreign seller, not direct, but through his selling agent were also exempted. The Regulation as then amended read in Section 1 of Article I:

“Section 1. *Purchases from foreign sellers—*
 (a) *Importations from foreign countries.* Neither this regulation nor any other price regulation, except to the extent that it contains express provision making it applicable to such purchases, applies to the purchase of any commodity to be ‘imported’ into the continental United States from any foreign country, where such purchase is made from a foreign seller, whose place of business is located outside the continental United States, *either directly or through* his selling agent wherever located.” (9 Fed. Reg. 2350.) (Emphasis ours.)

We respectfully submit that the appellee’s own words demonstrate that the Court’s construction of the term “*directly*” is erroneous. It was never meant to exclude from the scope of the exemption of the Import Regulation purchases by one who ordered from a selling agent through a food broker. The Price Administrator has never so decreed, and its attorneys in this case have never so contended at any stage of the proceedings. The language, viewed in light of its usage by the Price Administrator, does not impose such a restriction and should not be so construed. The Court’s decision to the contrary we submit is in error.

IV.

WHERE THE PARTIES PRESENT AN AGREED STATEMENT AS THE RECORD, THE COURT SHOULD DECIDE THE QUESTION SUBMITTED TO IT BY THE PARTIES AS THE ONLY POINT IN ISSUE. IT HAS NOT DONE SO HERE.

This appeal does not present the usual case in which the judgment may be affirmed on any ground in the record supporting it. The parties here have proceeded by an agreed statement under Rule 76 and presented but one question to this Court for determination: Did the lower Court err in ruling as a matter of law that appellant was not a selling agent? Under the rule, affirmance or reversal must depend on the answer to that question. The parties have agreed that there is no liability if appellant is a selling agent and have prepared the record to have this Court review the lower Court's determination of this question, and this alone. This they are permitted to do under the rule.

It has been said by the Courts that it is a "commendable procedure" for litigants to present appeals by an agreed statement.

The parties here have done this defining, for the Court, the sole issue to be decided, and stipulating that liability, if any, turns upon it.

Regardless of anything else said in this petition, for these reasons alone, it is submitted this Court should grant a rehearing to decide the question submitted to it by the parties.

The refusal of the Court to determine the question submitted; its searching out some other question for

decision, although the parties were agreed that only the first determined liability, makes a waste indeed of the effort expended by the litigants in reaching an agreement, and we submit, with all due respect, makes either a nullity, or dangerous entrapment of Rule 76 of the Federal Rules of Procedure.

We earnestly request this Court to grant a rehearing and determine the question submitted to it, whether the lower Court erred, in ruling as a matter of law in the face of the facts stipulated to, that appellant was not a "selling agent".

Dated, San Francisco,
June 21, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
June 21, 1946.

FRANCIS CARROLL,
*Of Counsel for Appellant
and Petitioner.*

No. 11152

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE COLUMBIAN NATIONAL LIFE INSUR-
ANCE COMPANY, a corporation,

Appellant,

vs.

A. QUANDT & SONS, a co-partnership,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

NOV 27 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Superior Court of the State of California
in and for the City and County of San Francisco.

No. 329970

A. QUANDT & SONS, a co-partnership,
Plaintiff,

vs.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, a corporation,
Defendant.

COMPLAINT TO RECOVER LIFE INSURANCE

Plaintiff complains of defendant, and for cause of action alleges:

I.

That The Columbian National Life Insurance Company is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, with a place of business in the City and County of San Francisco, State of California.

II.

That heretofore, to-wit, on or about the 23rd day of October, 1943, at the City and County of San Francisco, State of California, the defendant in consideration of the payment of Three Hundred Eighty-two and 05/100 (\$382.05) Dollars by Theodore W. Quandt, deceased, and a like amount each year on the 23rd day of October, until five full years premiums have been paid, and of the payment of the premium of Seven Hundred Sixty-four

and 10/100 (\$764.10) Dollars, made, executed and delivered to Theodore W. Quandt, its certain policy of life insurance in writing, Number 275203, a copy of which policy is [1*] annexed hereto and marked Exhibit "A" and made a part hereof as though duly incorporated herein, and whereby said defendant did insure the life of Theodore W. Quandt in the sum of Fifteen Thousand (\$15,000) Dollars.

III.

That A. Quandt & Sons is a co-partnership composed of Q. Quandt and Theodore W. Quandt, and were such co-partnership at all of the times herein mentioned up to the 2nd day of April, 1944, at which time Theodore W. Quandt died, and that said co-partners complied with all of the provisions of Sections 2466 and 2468 of the Civil Code of the State of California.

IV.

That at the time of making and entering into said policy of insurance by the defendant herein, to-wit, on the 23rd day of October, 1943, said Theodore W. Quandt complied with all of the rules, regulations and terms of said policy so issued, and so complied with all of the rules, terms and conditions of said policy at all of the times herein mentioned.

V.

That on or about the 2nd day of April, 1944, at the City and County of San Francisco, State of California, the said Theodore W. Quandt died, and

*Page numbering appearing at foot of page of original certified Transcript of Record.

at the time of his death the said Theodore W. Quandt's policy of insurance as hereinbefore set forth as Exhibit "A", was in full force and effect.

VI.

That said policy of insurance as hereinbefore set out, contracting to pay the loss, to-wit, the sum of Fifteen Thousand (\$15,000) Dollars to the above named plaintiff, was made and entered into in the City and County of San Francisco, State of California, and that said contract of agreement to pay said loss upon the death of the said Theodore W. Quandt is and was to be performed and the obligations and liabilities arising in the City and County of San Francisco, State of California, and that plaintiff relies upon said contract and the whole thereof.

VII.

That on or about the 6th day of April, 1944, the above named plaintiff filed with the above named defendant a proof of the death of the said Theodore W. Quandt, upon the form furnished by the defendant, and according [2] to the terms and conditions of the policy of insurance, and in conformity with the request and desire of defendant, and that said proof of death was filed in writing with said defendant, and that at no time after the making and filing of the proof of death with the defendant by the plaintiff herein has the defendant made any claim or any statement that said proof of death was defective, or that it would not in any

respect conform to the proof of death required by the defendant herein.

VIII.

That during the life of said Theodore W. Quandt, commencing with the 23rd day of October, 1943, up to and including the 6th day of April, 1944, plaintiff, as beneficiary in said policy of insurance paid to the above named defendant each and every and all of the premiums agreed to be paid by said Theodore W. Quandt to said defendant according to the terms and conditions of said policy of insurance, copy of which policy of insurance is hereto attached marked Exhibit "A" and made a part hereof, and that at the time of the death of the said Theodore W. Quandt to-wit on the 2nd day of April, 1944, said policy of insurance was in full force and effect.

IX.

That the above named plaintiff on or about the 6th day of April, 1934, made a demand upon the above named defendant for the payment of said principal of said policy, to-wit, Fifteen Thousand (\$15,000) Dollars, but that said defendant has failed, neglected and refused to pay the same.

X.

That neither the whole nor any part of said sum has been paid but the whole thereof remains due, owing and unpaid from the defendant to the plaintiff.

Wherefore, plaintiff prays judgment in the sum of Fifteen Thousand (\$15,000) Dollars principal,

together with interest thereon from the 6th day of April, 1944 and for costs of suit and for such other and further relief as the Court may deem meet and just.

C. M. DAWSON

WALTER E. DORN

Attorneys for Plaintiff [3]

State of California

City and County of San Francisco—ss.

A. Quandt, being first duly sworn, deposes and says:

That he is the surviving partner of the co-partnership of A. Quandt & Sons, and plaintiff in the above entitled case; that he has read the foregoing Complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and that as to such matters he believes it to be true.

A. QUANDT.

Subscribed and sworn to before me this 28th day of June, 1944.

[Seal]

KATHERINE T. McDONNELL

Notary Public, in and for the City and County of
San Francisco, State of California. [4]

EXHIBIT "A"

Chartered in Massachusetts

Age 52

No. 275203.

The Columbian National Life Insurance Company
of Boston Massachusetts

Hereby Insures the Life of

Theodore W. Quandt

(hereinafter called the Insured)

And Agrees to Pay, at its Home Office in Boston to
A. Quandt and Sons, Without Right of Revocation
(hereinafter called the Beneficiary)

The Sum Insured Fifteen Thousand Dollars upon receipt at its Home Office of due proof of the death of the Insured during the continuance of this contract. If there be no Beneficiary surviving at the death of the Insured the proceeds hereof shall be payable to the Executors, Administrators or Assigns of the Insured.

This Policy is issued in consideration of the application therefor, copy of which is hereto attached and which is made a part of this contract, and of the payment of the premium of Three Hundred Eighty-two and 05/100 Dollars, and of the payment of a like amount in each year on the Twenty-third day of October until five full years' premiums have been paid, and of the payment of the premium of Seven Hundred Sixty-four and 10/100 Dollars, on the Twenty-third day of October in each year thereafter during the continuance of this policy.

The Benefits and Provisions printed on the following pages are part of this contract.

In Witness Whereof, The Columbian National

Exhibit "A"—(Continued)

Life Insurance Company has, by its President and Secretary, executed this contract and caused the same to be duly countersigned at Boston, Massachusetts, on this Twenty-third day of October, 1943.

THE COLUMBIAN NATIONAL
LIFE INSURANCE COM-
PANY

FRANCIS P SEARS

President

and JOHN K HOWARD

Secretary

Conutersigned byPolicy
Registrar

Modified Life Policy

With Change of Premium Rate at End of Five
Years

Premiums Payable for Life

Non-Participating

This policy contains war and aviation restrictions

Form No. 3004

BENEFITS AND PROVISIONS

Premiums. All premiums are payable in advance at the Home Office in Boston, but may be paid to an authorized agent of the Company in exchange for a receipt signed by the President or Secretary and countersigned by said agent. Premiums are payable annually but may be paid on the semi-annual, quarterly or monthly basis at the Company's

Exhibit "A"—(Continued)

published rates effective when this policy was issued, provided the amount of such semi-annual, quarterly or monthly premium be not less than ten dollars.

Modification. No modification of this contract shall be made except over the signature of the President, a Vice President, the Secretary or an Assistant Secretary.

Grace Period. Thirty-one days' grace is allowed for the payment of all premiums after the first, during which period the policy remains in full force. Upon default in payment of any premium, this policy shall lapse, and the Company's only liability shall be such, if any, as is hereinafter provided.

Reinstatement. Should this policy lapse, it may be reinstated at any time upon evidence of insurability satisfactory to the Company and payment of all past due premiums with interest at six per centum per annum and payment or reinstatement of any other indebtedness hereon with interest at said rate, unless the Cash Value has been paid or the Extended Insurance period has expired.

Incontestability. This policy shall be incontestable after it shall have been in force for a period of two years from date of issue except for non-payment of premium, provided, however, that in case of misstatement of age the amount of insurance shall be such as the premium paid would have purchased at the true age. It is free from all conditions as to residence and travel. Death within

Exhibit "A"—(Continued)

two years from date of policy from suicide while sane or insane shall reduce the Company's liability hereunder to the amount of the reserve hereon.

Protection by Statute. This policy and the application therefor constitute the entire contract between the parties and all statements made by the Insured in the application shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid the policy or be used in defence to a claim under it unless contained in the written application and a copy of the same attached hereto.

Assignment. No assignment of this policy shall be effectual against the Company unless it is filed at the Home Office while this policy is in force. The Company assumes no responsibility for the validity of any assignment.

~~Beneficiary. Subject to the rights of any existing Assignee, the Insured may from time to time change the Beneficiary unless otherwise provided herein or by endorsement hereon. Every change of Beneficiary must be made by written notice to the Company at its Home Office on forms satisfactory to the Company. After such written notice has been received the change will relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of receipt of such notice or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office. If the right to~~

Exhibit "A"—(Continued)

~~change the Beneficiary has been reserved by the Insured, the Insured may, subject to the rights of any existing Assignee, agree with the Company to any change in or amendment to the policy without the consent of any Beneficiary.~~

[Notation on Margin]: "Beneficiary" clause ruled out. The Columbian National Life Insurance Company. Dated October 23rd, 1943.

JOHN K. HOWARD

Secretary

M. E. NORRIS

Policy Registrar

End. #79

Cash Loans. After this policy has an established Cash Value in accordance with the provisions hereof, the Insured without the consent of a revocably designated beneficiary, on the sole security of this policy properly assigned, may borrow at the interest rate of six per centum per annum, payable in advance, any sum not in excess of the Loan Value shown in the Table of Values herein, applicable as hereinafter provided. If interest is not paid when due, it shall be added to the existing loan and bear interest at the same rate. Non-payment of loan or interest shall not avoid the policy until the total indebtedness exceeds the Cash Value hereunder, nor until thirty-one days after the Company has mailed notice of such termination to the Insured and Assignee of record, if any, at their last known address.

Automatic Premium Loans. At the request of

Exhibit "A"—(Continued)

the Insured it is hereby provided that any premiums coming due on this policy after the policy has an established Cash Value, if not paid, will be charged against the policy as a loan, subject to the same terms and conditions as Cash Loans with respect to interest, repayment, continuation, failure to repay and voiding of the policy. If at any time the equity in the policy is not sufficient to continue the insurance in force for a full year, then in that case it will be kept in force for such whole number of days as the remaining equity will allow. While this policy is thus continued in force, all its non-forfeiture provisions remain operative, and the owner may, without furnishing evidence of the insurability of the Insured, resume payment of premiums at any time.

SETTLEMENT OPTIONS

In any cash settlement under this Policy, provided it is not less than One Thousand Dollars and provided further, that the Insured during his lifetime has not designated a method of settlement, the right to choose one of the following options, in lieu of receiving the proceeds in one sum, shall vest in the Payee. These options shall be available only with the consent of the Company if the Payee is a corporation, partnership, association, or assignee, or if the amount of each payment thereunder will be less than ten dollars.

Option (1) The proceeds of this policy may be left with the Company, payable at the death of the

Exhibit "A"—(Continued)

Payee, to bear interest at a rate declared by the Company from year to year. In no event, however, shall the interest rate be less than two and one-half per centum per annum. Interest is payable annually, semi-annually, quarterly or monthly as desired by the Payee. Furthermore, the entire proceeds or any part thereof may be withdrawn by the Payee after giving ninety days' notice in writing to the Company at its Home Office of intention to withdraw, which notice may be waived by the Company at its option.

Option (2) The proceeds hereof may be payable in equal monthly, quarterly, semi-annual or annual instalments in amounts determined at election, as long as the proceeds, together with interest thereon as provided in Option (1) shall suffice, with a final payment of any balance less than one such instalment.

Option (3) The proceeds hereof may be payable in limited monthly, quarterly, semi-annual or annual instalments in accordance with Table A. The income payments shown in the Table are for each One Thousand Dollars of such proceeds.

Option (4) The proceeds hereof may be payable in monthly, quarterly, semi-annual or annual instalments in accordance with Table B for a fixed period of ten, fifteen or twenty years, as selected in the request for this benefit, and as long thereafter as the Payee shall live. The instalments shown in the

Exhibit "A"—(Continued)

Table are for each One Thousand Dollars of proceeds.

Should the Payee die before receiving all of the instalments provided in Table A, or the instalments for the years certain if payable under the provisions of Table B, the unpaid instalments certain commuted on the basis of three per centum per annum compound interest shall be paid to his Executors, Administrators or Assigns unless otherwise agreed upon in writing.

Excess Interest Payments. The Options set forth in Table A and B provide for instalments based on a guaranteed interest rate of three per centum per annum. In addition to each instalment certain after the first, the Payee will receive such interest in excess of the guaranteed rate as the Company may declare for that year on funds remaining with the Company.

Instalment Tables

The Limited Instalments shown in the following Table A and the Instalment Certain in the following Table B are those provided in Settlement Options (3) and (4) respectively for each \$1,000 of proceeds of this policy, the first payment to be made when the proceeds become payable. The instalments are shown on a monthly basis. To determine the amount of annual, semi-annual or quarterly instalments, multiply the monthly instalment by 11.83, 5.96 or 2.99 respectively.

Exhibit "A"—(Continued)

Paid-Up Value. In the event of the lapse of this policy after the policy has an established Cash Value in accordance with the provisions hereof, the policy shall become effective automatically for Paid-up Insurance, payable as provided on the first page hereof, the amount granted being as stated in the Table of Values herein for the number of years the policy has been in force. This Paid-up Insurance shall have increasing Cash and Loan Values.

Extended Insurance. Cash Value. In lieu of such Paid-up Insurance, the Insured may, by written notice filed at the Home Office within the days of grace, elect to have this policy continued as Extended Insurance, payable as provided on the first page hereof, for the period stated in the Table of Values herein, and having a cash surrender value; or may procure the Cash Value on satisfactory release and surrender of the policy.

Payment of Loan and Cash Values. Payment of any loan value other than to pay premiums on any life policies of the Insured in this Company, and payment of any cash value may be deferred for ninety days after the application therefor.

Deduction of Indebtedness. In the payment of any claim under this policy at the death of the Insured, there shall first be deducted any indebtedness to the Company on this policy, including any unpaid premium or portion thereof for the then current policy year. If there be any indebtedness to the Company on this policy including any unpaid

Exhibit "A"—(Continued)

premium or portion thereof to the date of lapse or surrender the Cash and Loan Values shall be diminished thereby, and the Paid-up or Extended Insurance shall be such as may be purchased by the Cash Value so diminished, such Extended Insurance to be for an amount equal to the sum insured less such indebtedness.

Reserve. The reserve on this policy is computed upon the American Experience Table of Mortality with interest at three per centum and for the face amount of the policy by the level premium method modified so that the net annual premium for the first five years is exactly one-half the net annual premium for subsequent years. The Cash or Loan Value is the same as the Net Value of the Paid-up or Extended Insurance provided for herein and equals such reserve less not more than two and one-half per centum of the sum insured. Beginning with the twentieth year the Cash or Loan Value will be the full reserve at the nearest whole dollar per thousand dollars of insurance. The values stated herein at least equal those required by the Statutes of Massachusetts.

Table of Loan and Non-Forfeiture Values

The following table shows the Cash, Loan and Paid-up Insurance values for each One Thousand Dollars of the sum insured and the time for which the sum insured may be extended as Term Insurance. The period of Extended Insurance begins on the date of the defaulted premium and includes

Exhibit "A"—(Continued)

the days of grace. The Cash Value stated below is available only at the end of the year indicated and only if premiums have been paid to the end of the year indicated. If, after the policy has acquired a Cash Value, an instalment of the year's premium is paid between anniversaries in accordance with the provisions of the policy, such payment will proportionately adjust these values.

At end of Policy Years stated below	Cash or Loan Value per each \$1,000 of the sum insured	Paid-Up Insurance per each \$1,000 of the sum insured	Extended Insur- ance, without re- gard to amount of Policy, expiring at end of period stated below	
Yrs.			Yrs.	Days
4	\$ 7	\$ 11	0	133
5	13	21	0	230
6	43	67	1	333
7	73	111	2	356
8	103	154	3	311
9	133	196	4	209
10	163	236	5	59
11	194	277	5	243
12	224	315	6	16
13	254	351	6	126
14	284	387	6	213
15	313	420	6	274
16	342	452	6	320
17	370	483	6	348
18	398	512	7	3
19	433	550	7	67
20	468	587	7	122
21	493	611	7	98
25	589	699	6	279
30	701	792	5	249

M.L. Age 52 (D)

Values for other years will be furnished upon request

Exhibit "A"—(Continued)

The Columbian National Life Insurance Company
Boston, Massachusetts

Rider to be attached to and form a part of
Policy No. 275203.

Life of Theodore W. Quandt.

Death of the insured under any of the following
circumstances is a risk not assumed by the Com-
pany under this policy and any supplement thereto:

a. (1) From any cause during the period of his
Military or Naval service outside the United States
and Canada for any country at war, or

(2) Within six months after termination of such
service if death (wherever occurring) results from
any wounds, injuries, or disease received or suffered
while in such service; or

b. Within two years from the date of issue of
this policy as a result of any act, incident, or hazard
of war occurring outside the United States and
Canada; or

c. As a result of operating or riding in any
species of aircraft or descending therefrom or there-
with except as a fare-paying passenger on a com-
mercial airline flying on a regularly scheduled flight
between definitely established airports.

In the event of such death, the Company will pay
to the beneficiary in full discharge of all liability
the regular premiums paid on this policy or the
reserve, if greater, decreased by the amount of any

Exhibit "A"—(Continued)

indebtedness on or secured by this policy, but in no event shall the amount so payable be more than would be payable under this policy if this rider were not attached.

"United States" as used herein means the forty-eight states and the District of Columbia. "War" includes undeclared war and insurrection. "Military or Naval service" includes, but is not limited to, service in any air force or branch, in any other of the armed forces, or in any auxiliary unit.

The clause in this policy entitled "Incontestability" is hereby amended by the insertion of the words "and except for violation of the conditions of the policy relating (1) to Military or Naval service in time of war, and (2) to aviation" immediately following the words "except for non-payment of premium."

Boston, Mass. 23rd day of October 1943.

THE COLUMBIAN NATIONAL
LIFE INSURANCE COM-
PANY

Countersigned by

M. E. NORRIS

Policy Registrar

JOHN K HOWARD

Secretary [9]

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS

For Insurance on the Life of _____
To which the following information pertains.

1. Are you single, married, widowed or divorced? Married

2. Sex of Insured Male Age 34 Date of Birth 10-1-1904

3. Place of Birth Bethel, Maine Name of Insured John Francis

4. Present Address: If it differs from your latest one, please give latest one. If not, state as it is. State Me City Bethel

5. 66 BRADDOCK AVENUE SAN FRANCISCO

6. San Francisco Calif.

7. Business Address: If it differs from your latest one, please give latest one. If not, state as it is. State Calif. City San Francisco

8. 318 GARY STREET SAN FRANCISCO

9. Send premium notice to: San Francisco

10. Mark with "X" Business Address

11. What is your occupation? Insurance Agent

12. What is the nature of the business? Insurance Agent

13. How much do you do? Full

14. Name of firm or employer None

15. Is it a firm or other company? No

16. What other occupations have you had during past three years? None

17. Have you ever failed to work full time or do you contemplate doing so? No

18. Have you any intention of changing your residence or occupation or extending outside of the Territory (zone within the court law)? No

19. Are you now or have you ever been engaged to or associated with any person or with any company? No

20. Are you now or have you ever been engaged to or associated with any person or with any company? No

21. Are you now or have you ever been engaged to or associated with any person or with any company? No

22. Are you now or have you ever been engaged to or associated with any person or with any company? No

23. Are you now or have you ever been engaged to or associated with any person or with any company? No

24. Are you now or have you ever been engaged to or associated with any person or with any company? No

25. Are you now or have you ever been engaged to or associated with any person or with any company? No

26. Are you now or have you ever been engaged to or associated with any person or with any company? No

27. Are you now or have you ever been engaged to or associated with any person or with any company? No

28. State premium to be paid weekly Amount \$15.00

29. Mark with "X" the additional benefits desired None

30. Date policy protection is desired October 23, 1943

31. Fill Complete Protection is desired Yes

32. Mark with "X" the additional benefits desired None

33. Premium Payable? Mark with "X" Annually

34. In case with Term Insurance None

35. What premium have you paid on account of this insurance? None

36. What is the nature of the business to be paid in event of your death? Business

37. One death and none Business

38. Loss with None right to change beneficiary

39. What Life Insurance is now in force on your life? None

40. Life Insurance is now in force on your life? None

41. Life Insurance is now in force on your life? None

42. Life Insurance is now in force on your life? None

43. Life Insurance is now in force on your life? None

44. Life Insurance is now in force on your life? None

45. Life Insurance is now in force on your life? None

46. Life Insurance is now in force on your life? None

47. Life Insurance is now in force on your life? None

48. Life Insurance is now in force on your life? None

49. Life Insurance is now in force on your life? None

50. Life Insurance is now in force on your life? None

51. Life Insurance is now in force on your life? None

52. Life Insurance is now in force on your life? None

53. Life Insurance is now in force on your life? None

54. Life Insurance is now in force on your life? None

55. Life Insurance is now in force on your life? None

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, BOSTON, MASSACHUSETTS

Personal Statements made by Proposed Insured and recorded by Medical Examiner

1. Have you ever been married? Yes

2. Have you ever been married? Yes

3. Have you ever been married? Yes

4. Have you ever been married? Yes

5. Have you ever been married? Yes

6. Have you ever been married? Yes

7. Have you ever been married? Yes

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92. Have you ever been married? Yes

93. Have you ever been married? Yes

94. Have you ever been married? Yes

95. Have you ever been married? Yes

96. Have you ever been married? Yes

97. Have you ever been married? Yes

98. Have you ever been married? Yes

99. Have you ever been married? Yes

100. Have you ever been married? Yes

Exhibit "A"—(Continued)

The Columbian National Life
Insurance Company
of Boston, Massachusetts

Policy No. 275203.

Insuring the Life of
Theodore W. Quandt
for \$15,000.00 on the

Modified Life Plan

With War & Aviation Restrictions

Premium First Five Years \$382.05

Premium After Five Years \$764.10

Premiums Payable for Life

October Twenty-third

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL TO FEDERAL
COURT AND STAYING PROCEEDINGS

This matter having come on regularly to be heard in the above-entitled court, in the Law and Motion Department thereof, upon the petition and motion of the defendant, The Columbian National Life Insurance Company, a corporation, and it appearing to the court that proper notice of said petition and motion has been given to the plaintiff, and that the above-entitled action is wholly between citizens of different states, and that the matter is controversy exceeds in value the sum of Three Thousand Dollars (\$3,000.00), and that the action is one of which the United States District

Courts are given original jurisdiction, and that said defendant has duly petitioned for a removal thereof to the United States District Court for the Northern District of California, Southern Division, and has filed its bond in connection therewith,

Now, Therefore, It Is Ordered that the within action be and it hereby is transferred and removed to the United States District Court for the Northern District of California, Southern Division, and

It Is Further Ordered that all proceedings herein in the within court be and they hereby are stayed.

Dated: July 17th, 1944.

ROBERT McWILLIAMS

Judge of the Superior Court

[Endorsed]: Filed Aug. 10, 1944.

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 23581-G

A. QUANDT & SONS, a co-partnership,
Plaintiff,

vs.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, a corporation,
Defendant.

ANSWER TO COMPLAINT

Comes now the defendant and answering the plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

The defendant avers that it has no information or belief as to the allegations in paragraph III other than that relating to the death of Theodore W. Quandt sufficient to enable it to answer the same, and placing its denial upon this ground denies each and all of the allegations thereof.

II.

Denies each and all of the allegations of paragraphs IV, VII and X; admits that the plaintiff has filed with the defendant the proofs of loss required under said policy; admits that the plaintiff has demanded the payment of the sum of Fifteen Thousand Dollars (\$15,000) from the defendant; admits that the defendant has refused to pay said sum; denies that said sum or any part thereof is due or owing or unpaid from the defendant to the plaintiff.

And as a first separate answer and defense the defendant alleges:

I.

That on or about November 15, 1943, said Theodore W. Quandt made written application to the defendant for a policy of life insurance; that in reliance upon said application and the representations of said Theodore W. Quandt therein this defendant issued the policy of life insurance referred to in the plaintiff's complaint, and annexed thereto and marked Exhibit "A"; that said written application is attached to and made a part of said policy of insurance.

II.

That part 1 of said application provides in part as follows:

“It is agreed as follows: 1. That the insurance hereby applied for shall not take effect until the issuance and delivery of the policy and the payment of the first premium thereon while the proposed insured is in sound health.”

that said policy of insurance was delivered to said Theodore W. Quandt on December 4, 1943; that at said time said Theodore W. Quandt was not in sound health; that said Theodore W. Quandt at said time was in fact suffering from cancer and later died from said disease of cancer; that by reason thereof the insurance provided in said policy did not take effect.

III.

That upon the discovery of the fact that said Theodore W. Quandt was not in sound health at the time of the delivery of said policy this defendant tendered to the plaintiff herein all of the premiums which had been paid on said policy; that the plaintiff refused to accept said premiums; that the defendant is ready and able and is willing and hereby offers to pay said premiums to the plaintiff or to the clerk of the court for the use and credit of the plaintiff.

And as a second separate answer and defense this defendant alleges:

I.

That on or about November 15, 1943, said Theodore W. Quandt made written application to the defendant for a policy of life insurance; that in reliance upon said application and the representations of said Theodore W. Quandt therein this defendant issued the policy of life insurance referred to in the plaintiff's complaint, and annexed thereto and marked Exhibit "A"; that said written application is attached to and made a part of said policy of insurance.

II.

That in part II of said application the following questions were asked and the following answers were given by said Theodore W. Quandt:

1a. Have you now any disease or disorder? If so, what? No.

7a. Have you had any medical advice during the past five years? Yes.

b. Record the nature and date of each illness. Health check up about June 1943—no abnormality found.

c. What is the name and address of every physician consulted during the past five years? Dr. V. H. Mitchell, San Francisco.

9. Have you ever suffered from, taken treatment for, or consulted a physician for any complaint or affection:

c. Of the heart or blood vessels or abnormal blood pressure (palpitation included)? No.

d. Of the digestive organs (dyspepsia, dysentery, liver complaint, hernia, fistula, gall stones, hepatic colic, vomiting of blood, appendicitis included)? No.

e. Of the urinary or generative organs (gravel, renal colic, stricture, diabetes, gonorrhoea, rising at night to pass urine, included)? No.

10. Have you ever had any disease, illness, injury, or operation other than stated by you above? No.

III.

That the answers given by said Theodore W. Quandt to said questions in said application were false in the following respects; and in making said answers said Theodore W. Quandt concealed from the defendant the following facts:

That within a year prior to the making of said application said Theodore W. Quandt had suffered from and consulted a physician for complaints of the heart; that within six months prior to the making of said application said Theodore W. Quandt had suffered from and had consulted a physician for complaints of the digestive organs and had suffered from and had consulted a physician for complaints of the urinary organs.

IV.

That each of said representations made by said Theodore W. Quandt in making said answers to said questions in said application were material to the risk undertaken by this defendant in issuing its policy of insurance, and each of the matters so con-

cealed by said Theodore W. Quandt were material to the risk undertaken by this defendant in issuing its policy of insurance, and this defendant would not have issued the said policy of insurance had it known that said representations or any of them were false or that said matters had been concealed from it.

V.

That upon discovering said concealments and the falsities of said answers following the death of said Theodore W. Quandt this defendant rescinded the said policy of insurance and tendered to the plaintiff all of the premiums paid to it on account of said policy of insurance; that the plaintiff refused to accept said tender and this defendant is ready and able and is willing to return said premiums to the plaintiff and offers to deposit the same with the clerk of this court to the credit and use of the plaintiff.

Wherefore, this defendant prays that the plaintiff take nothing by reason of his complaint on file herein, and for defendant's costs of suit incurred herein, and for such other and further relief as the court may deem proper.

Dated: August 21, 1944.

KEESLING & KEIL
FRANCIS CARROLL

Attorneys for Defendant.

State of California,
City and County of San Francisco—ss.

Francis Carroll, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant in the above entitled action; that he makes this verification for and on behalf of the defendant for the defendant is out of the City and County of San Francisco; that he has read said answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and as to those matters he believes them to be true.

FRANCIS CARROLL

Subscribed and sworn to before me this 21st day of August, 1944.

[Seal]

ALFRED D. MARTIN

Notary Public in and for the City and County of San Francisco, State of California.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Aug. 22, 1944.

[Title of Court and Cause.]

STIPULATION FOR THE TAKING OF THE
DEPOSITIONS OF HUGH H. CRAW-
FORD, WILLIAM L. SITGREAVES,
HENRY A. PLIMPTON, AND RALPH E.
PIERCE

It Is Hereby Stipulated, by and between the attorneys for the plaintiff and the attorneys for the defendant that the depositions of Hugh W. Crawford, William L. Sitgreaves, Henry A. Plimpton,

and Ralph E. Pierce, witnesses on behalf of the defendant, may be taken in Boston, Massachusetts, before Emilie B. Murray, Notary Public in and for the State of Massachusetts, or any other Notary Public in and for the State of Massachusetts duly qualified in the premises, upon the attached interrogatories and cross interrogatories at any time prior to the trial of the within action convenient to said Notary and said witnesses.

Said depositions and each of them will be taken in the manner provided by and in accordance with Rules 26 to 37 inclusive relating to depositions and discovery contained in the Rules of Civil Procedure for the District Court of the United States, and when so taken and transcribed may be used in evidence in the above entitled action.

Dated: November 1, 1944.

C. M. DAWSON

WALTER E. DORN

Attorneys for plaintiff, A.

Quandt & Sons

KEESLING & KEIL

By WILLIAM H. KEESLING

Attorneys for Defendant

(Here follows Deft's Exh. 1-A for Identification and Deft's Exh. 1-B for Identification, a photostatic copy of part of Exhibit A attached to the Complaint to Recover Life Insurance, and also included in Pl's Exhibit No. 2.)

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore come on for trial regularly, without a jury, a trial by jury having been expressly waived by the parties in open Court, the cause was tried before the Honorable Louis E. Goodman, Judge of the United States District Court, Northern District of California, Southern Division; C. W. Dawson and Walter E. Dorn appearing as counsel for plaintiff, and Keesling & Keil and Francis Carroll appearing as counsel for defendant, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined and documentary evidence introduced by the respective parties and the evidence being closed the cause was submitted to the Court for consideration and decision on the 12th day of February, 1945, and after deliberation thereon the Court files its findings and decision in writing and orders that judgment be entered herein in favor of plaintiff in accordance therewith.

The Court makes the following

FINDINGS OF FACT

1. That it is true that the Columbian National Life Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, with a principal place of business in the City and County of San Francisco, State of California.

2. That it is true that heretofore, to wit, on the 23rd day of October, 1943, at the City and County of San Francisco, State of California, the defendant in consideration of the payment of Three Hundred Eighty two and 05/100 (\$382.05) Dollars by Theodore W. Quandt, deceased, and a like amount each year on the 23rd day of October, until five (5) full year's premium have been paid of the payment of the premium of Seven Hundred Sixty-four and 10/100 (\$764.10) Dollars made, executed and delivered to Theodore W. Quandt its certain policy of life insurance in writing #275203, a copy of which policy of life insurance was annexed to the complaint on file herein, and whereby the defendant did insure the life of Theodore W. Quandt in the sum of Fifteen Thousand Dollars (\$15,000.00).

3. That it is true that A. Quandt & Sons is a co-partnership composed of A. Quandt and Theodore W. Quandt, and were such co-partners prior to the 23rd day of October, 1943, and ever since up to the 2nd day of April, 1944, at which time Theodore W. Quandt died, and that said co-partners complied with all of the provisions of Section 2466 and 2468 of the Code of Civil Procedure of the State of California.

4. That it is true that at the time of making and entering into said policy of insurance by the defendant herein, on the 23rd day of October, 1943, said Theodore W. Quandt complied with all of the rules, regulations and terms of said policy so issued and so complied with all of the rules, terms, and con-

ditions of said policy at all of the times mentioned in the complaint.

5. That it is true that on the 2nd day of April, 1944, at the City and County of San Francisco, State of California, the said Theodore W. Quandt died, and at the time of his death the policy of insurance set forth in the complaint was in full force and effect.

6. That it is true that the said policy of insurance set out in the complaint contracted to pay the loss in the sum of Fifteen Thousand Dollars (\$15,000.00) to the plaintiff herein and that said policy of insurance was made and entered into in the City and County of San Francisco, State of California, and that said contract or agreement to pay said loss upon the death of said Theodore W. Quandt is and was to be performed and the obligations and liabilities arose in the City and County of San Francisco, State of California, and plaintiff relied upon said contract and the whole thereof.

7. That it is true that on the 6th day of April, 1944, plaintiff herein filed with the above named defendant proof of death of said Theodore W. Quandt upon the form furnished by the defendant and according to the terms and conditions of the policy of insurance and in conformity with the request and desire of the defendant, and that said proof of death was filed in writing with said defendant, and that at no time after the filing of said proof of death with the defendant by the plaintiff did defendant make any claim or any statement

that said proof of death was defective or that it did not in any respect conform to the proof of death required by the defendant.

8. That it is true that during the life of said Theodore W. Quandt, commencing with the 23rd day of October, 1943, up to and including the 6th day of April, 1944, plaintiff, as beneficiary in said policy of insurance, paid to the above named defendant each and every, and all the premiums agreed to be paid by said Theodore W. Quandt to said defendant according to the terms and conditions of said policy of insurance, a copy of which was attached to the complaint, and that at the time of the death of said Theodore W. Quandt on the 2nd day of April, 1944, said policy of insurance was in full force and effect.

9. That it is true that on the 6th day of April, 1944, plaintiff herein made a demand upon the above named defendant for the payment of said principal of said policy, to wit: Fifteen Thousand Dollars (\$15,000.00), but that said defendant failed, neglected and refused to pay the same.

10. That neither the whole, nor any part of said sum has been paid, and that the whole thereof remains due, owing and unpaid from defendant to plaintiff.

11. That it is true that the application for a policy of life insurance issued herein contained the following provision:

“It is agreed as follows: 1. That the insurance hereby applied for shall not take effect

until the issuance and delivery of the policy and the payment of the first premium thereon while the proposed insured is in sound health,"

and that it is true that said policy of insurance was delivered to Theodore W. Quandt on the 4th day of December, 1943. That it is true that at the time of the delivery of said policy of insurance to Theodore W. Quandt, said Theodore W. Quandt, deceased, had complied with all the terms of said policy of insurance and in accordance with the terms of the policy of insurance was in sound health, and that it is true at said time of delivery said policy of insurance did go into full force and effect.

12. That it is not true that the defendant discovered that said Theodore W. Quandt was not in sound health at the time of the delivery of said policy. That it is true that defendant tendered to plaintiff the premiums which had been paid on account of said policy of insurance, and it is also true that plaintiff refused to accept the return of said premiums.

13. That it is not true that within a year prior to the making of the application for life insurance said Theodore W. Quandt had suffered from and consulted a physician for complaints of the heart, and that it is not true that within six months prior to the making of said application for life insurance, said Theodore W. Quandt had suffered from and consulted a physician for complaints of the digestive organs, and it is not true that said Theodore W. Quandt had suffered from and had consulted a

physician for complaints of the urinary organs. That it is true that said Theodore W. Quandt had never had any disease, illness, injury, or operation other than those stated in the application for insurance.

14. That it is not true that Theodore W. Quandt in making application for the life insurance policy concealed any material information from the defendant, or that he concealed any matters material to the risk undertaken by the defendant in issuing its policy of insurance. That it is not true that Theodore W. Quandt made any misrepresentations or any false statements, nor concealed any material or substantial information, and that the defendant issued said policy of insurance being in possession of all of the facts and material information required by the terms and conditions of the application for insurance.

15. That it is not true that the defendant discovered any concealments nor any falsities in the representations and statements made by said Theodore W. Quandt after the death of said Theodore W. Quandt.

16. That all other allegations of the answer of the defendants herein that seem to be or are in conflict with the above findings, or in which no specific finding has been found are untrue.

The Court makes the following Conclusions of Law from the foregoing findings of fact.

That the plaintiff *A. Quandt & Sons*, a co-partnership, is entitled to recover from the defendant *Columbian National Life Insurance Company*, a cor-

poration, and have judgment against said Columbian National Life Insurance Company, a corporation, for the sum of Fifteen Thousand Dollars (\$15,000.00), together with interest thereon at the legal rate from the 14th day of April, 1944, and for costs of suit to be hereafter taxed.

Dated: March 15, 1945.

LOUIS E. GOODMAN

Judge of the United States
District Court.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Mar. 15, 1945.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 23561-G

A. QUANDT & SONS, a co-partnership,
Plaintiff,

vs.

THE COLUMBIAN NATIONAL LIFE INSUR-
ANCE COMPANY, a corporation,
Defendant.

JUDGMENT

This cause having heretofore come on for trial regularly without a jury, a trial by jury having been expressly waived by the parties in open Court, the cause was tried before the Honorable Louis E. Goodman, Judge of the United States District

Court, Northern District of California, Southern Division; C. W. Dawson and Walter E. Dorn appearing as counsel for plaintiff and Keesling & Keil and Francis Carroll appearing as counsel for defendant whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined and documentary evidence introduced by the respective parties and the evidence being closed the cause was submitted to the Court for consideration and decision on the 12th day of February, 1945, and after deliberation thereon the Court files its findings and decision in writing and orders that judgment be entered herein in favor of plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that A. Quandt & Sons, a co-partnership, the plaintiff, do have and recover of and from the Columbian National Life Insurance Company, a corporation, the defendant, the sum of Fifteen Thousand Dollars (\$15,000.00) with interest thereon at the rate of 7% per annum from the 14th day of April, 1944, amounting to the sum of Nine Hundred Ten and 04/100 (\$910.04) Dollars, together with plaintiff's costs and disbursements incurred in this action.

Dated: March 16, 1945.

LOUIS E. GOODMAN,

Judge of the U. S. District
Court.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed Mar. 16, 1945.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that The Columbian National Life Insurance Company, a corporation, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 16, 1945.

Dated: June 6, 1945.

FRANCIS CARROLL,
KEESLING & KEIL,

Attorneys for Appellant The Columbian National
Life Insurance Company, a corporation.

[Endorsed]: Filed June 13, 1945.

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

Good cause appearing therefor:

It Is Hereby Ordered that the time for filing of the record on appeal and docketing of the above entitled action in the Appellate Court is hereby extended thirty days from and after July 23, 1945.

Dated: July 23, 1945.

LOUIS E. GOODMAN,

Judge of the District Court of
the United States.

[Endorsed]: Filed July 23, 1945.

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The defendant and appellant, The Columbian National Life Insurance Company, a corporation, hereby designates the following portions of the record and proceedings as the record on appeal:

1. The complaint of the plaintiff, A. Quandt & Sons, a co-partnership.
2. The order for removal to Federal Court.
3. Answer to plaintiff's complaint of defendant, The Columbia National Life Insurance Company, a corporation.
4. Depositions of Hugh W. Crawford, William L. Sitgreaves, Henry A. Plimpton, and Ralph E. Pierce, and the stipulation pursuant to which said depositions were taken.
5. Findings of fact and conclusions of law.
6. The judgment entered in said action.
7. Notice of Appeal.
8. All of the evidence taken and all of the proceedings had at the trial of said action before the Honorable Louis E. Goodman, Judge of the United States District Court.

Dated: August 7, 1945.

FRANCIS CARROLL,
KEESLING & KEIL,

Attorneys for Defendant and
Appellant.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed Aug. 17, 1945.

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including September 11, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 1, 1945.

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed September 1, 1945.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 23581-G

A. QUANDT & SONS,

Appellee,

vs.

THE COLUMBIAN NATIONAL LIFE INSUR-
ANCE COMPANY, a corporation,

Appellant.

ORDER EXTENDING TIME FOR FILING OF
RECORD ON APPEAL

Upon consideration, and good cause appearing therefor;

It Is Hereby Ordered that the time within which the record on appeal in the above entitled action may be filed in this court is hereby extended thirty days to and including the 11th day of October, 1945.

Dated: September 11, 1945.

FRANCIS A GARRECHT,
Judge of the United States
Circuit Court of Appeals.

[Endorsed]: Filed September 11, 1945. Paul P. O'Brien, Clerk.

A True Copy. Attest: Sept. 28, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Sept. 28, 1945.

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 87 pages, numbered from 1 to 87, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of A. Quandt & Sons, a co-partnership, Plaintiff, vs. The Columbian National Life Insurance Company, a corporation, Defendant, No. 23581-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$13.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 1st day of October, A.D. 1945.

[Seal]

C. W. CALBREATH,
Clerk.

By E. VAN BUREN,
Deputy Clerk.

In the Southern Division of the United States District Court in and for the Northern District of California

No. 23,581-G

A. QUANDT & SONS, a co-partnership,
Plaintiff,
vs.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, a corporation,
Defendant.

Tuesday, January 23, 1945

Before: Hon. Louis E. Goodman, Judge.

Counsel Appearing:

For Plaintiff Walter E. Dorn, Esq.

For Defendant: Francis Carroll, Esq.

JAMES F. MADDEN,

called for the plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. James F. Madden.

Mr. Dorn: Q. Where do you reside, Mr. Madden?

A. 810 Twenty-fifth Avenue, San Francisco.

Q. What is your official position, if any?

A. I am a deputy county clerk.

Q. Of the City and County of San Francisco?

A. Yes.

(Testimony of James F. Madden.)

Q. Mr. Madden, I will show you a document which purports to be a certificate of general partnership transacting business under a fictitious name of Quandt & Sons, and ask you if that is an official record from the County Clerk's Office.

A. Yes, it is.

Q. And that was filed on what date, as appears on there? A. June 23, 1941.

Q. And the names of the partners are Alexander Quandt and Theodore W. Quandt. That was advertised in the Recorder, and if you will, tell us the time and date of the publication.

A. June 24, 1941, and July 1, 8, 15 and 22, 1941.

Q. That was filed when in the County Clerk's Office? A. July 23, 1941.

Mr. Dorn: We will offer this in evidence as an official record showing the organization of the co-partnership of Quandt & Sons, the plaintiff in this case.

Mr. Carroll: No objection.

The Court: Very well. It may be admitted.

(Document marked Plaintiff's Exhibit 1 in evidence.)

Mr. Dorn: Would it be possible to withdraw the original?

The Court: Have you a copy to substitute?

Mr. Dorn: No.

The Court: Would you care to have the reporter copy it and then it may be withdrawn?

Mr. Dorn: That would be all right.

(Testimony of James F. Madden.)

The Court: Is that satisfactory?

Mr. Carroll: Yes.

Mr. Dorn: That is all.

Mr. Carroll: No questions.

J. H. WOOD,

called for plaintiff; sworn.

The Clerk: Will you please state your name to the court?

A. J. H. Wood.

Mr. Dorn: Q. Where do you reside, Mr. Wood?

A. Route 2, Box 437, Los Altos, California.

Q. What is your business?

A. General Agent, the Columbian National Life Insurance Company.

Q. Part of your duties is to write life insurance?

A. Yes.

Q. You solicit life insurance from various people? A. Yes.

Q. You did solicit life insurance from Theodore W. Quandt, the deceased in this case?

A. Yes.

Q. By the way, did you write many policies of insurance for Mr. Quandt in your company?

A. Some seven or eight in two companies over a period of years.

Q. You wrote this particular policy of insurance that is in question now? A. Yes.

Q. I will show you a policy of insurance and

(Testimony of J. H. Wood.)

ask you, Mr. Wood, if that is the policy of insurance that you wrote for Mr. Theodore W. Quandt during his lifetime? A. Yes.

Q. You signed it as an agent for your company?

A. Yes.

Q. Where did you deliver the policy?

A. To Mr. T. W. Quandt, at his office?

Q. Where was that?

A. 374 Guerrero Street, San Francisco.

Q. When you solicited this insurance did you call him in the first instance? A. Yes.

Q. He did not call on you; you called on him?

A. Yes.

Q. When you delivered the policy to him was the premium then due or any sums of money paid to you representing the company? A. Yes.

Q. Did you know, Mr. Quandt very well during his lifetime?

A. Quite well, from the point of view of insurance and some of his personal affairs.

Q. You saw him very often?

A. Reasonably so, yes.

Q. At any of the times you have seen him and talked to him did he complain of any illness?

A. No.

Q. At the time you delivered the policy, as far as appearance was concerned, was he of sound health? A. Perfectly so, yes.

Mr. Dorn: We offer the policy in evidence, if your Honor please, as Plaintiff's Exhibit 2.

Mr. Carroll: No objection.

(Testimony of J. H. Wood.)

The Court: It may be admitted.

(The policy of insurance was marked Plaintiff's Exhibit 2 in evidence.)

Cross-Examination

Mr. Carroll: Q. One question: The other policies you have referred to which were issued by the Columbian National Life Insurance Company have all been paid except this policy and the other policy which was issued at the same time, is that correct? A. Yes.

Mr. Carroll: That is all.

The Court: Do I understand there was another policy issued at the same time?

Mr. Dorn: I believe there was, but that is not before your Honor.

Mr. Carroll: There were various policies issued, but all of the policies issued prior thereto had been paid. These two policies are the ones in dispute.

GEORGE W. COX,

called for the plaintiff; sworn.

The Clerk: Q. Please state your name to the court.

A. George W. Cox.

Mr. Dorn: Q. Doctor, where do you live?

A. I live in San Francisco, 354 Laguna Honda Boulevard.

(Testimony of George W. Cox.)

Q. You are duly and regularly licensed to practice your profession as a physician in the State of California? A. I am.

Q. And I assume you have been practicing for a number of years?

A. I have been here since the last war.

Q. During the lifetime of Theodore W. Quandt did you have occasion to examine him?

A. I did.

Q. I will show you a policy of insurance which is marked Plaintiff's Exhibit 2, and particularly this photostatic copy on the back, and ask you in whose handwriting the longhand is on that policy?

A. That is my own.

Q. You made that handwriting at the time you made your physical examination of Mr. Quandt?

A. I did.

Q. And at the time you made your examination of Mr. Quandt, did you make a thorough examination of him?

A. I think I did, I always do.

Q. You always do? A. Yes.

Q. At the time you made this examination you undoubtedly examined the heart? A. I did.

Q. And what was your finding?

A. It was normal, as far as I could make out.

Q. When you say "normal," that means perfect health, then? A. Yes.

Q. In other words, sound, healthy condition?

A. Yes.

Q. Did you examine his urine at that time?

(Testimony of George W. Cox.)

A. I not only examined it but I sent some to the home office.

Q. What was your finding with reference to that?

A. I observed it was all right or it would have been held up until I had additional specimens. I don't remember, myself. I only know from the facts that there would have been other specimens if it had not been all right. I got a chemical analysis only. They do the microscopic at the home office.

Q. From the chemical analysis you found everything negative? A. Yes.

Q. What examination, if any, did you or could you make of the digestive organs?

A. Well, you bare the abdomen and see if there is evidence of anything unusual in the abdominal cavity.

Q. What did you find?

A. I did not find anything abnormal in it.

Q. As a matter of fact, from your examination did you find the applicant at the time of your examination in sound health at the time?

A. I recommended him for insurance?

Q. Will you be a little more specific?

A. I did.

Q. You found no ailment of any kind as far as the applicant was concerned?

A. Well, I found nothing that would be of consequence to the insurance company at least.

Q. Did you find anything?

A. I do not remember anything that was wrong.

(Testimony of George W. Cox.)

All of my questions were answered in such a way as to be acceptable for insurance.

Q. Did you find any signs that he might at that time have been suffering from injury in any place? A. No.

Q. Did you make any examination when you made your examination for life insurance to ascertain if the patient is suffering from pain?

A. Well, as to the abdomen, we feel over the abdomen. The history, a good deal of it has to be what he tells you?

Q. Did you make any examination of the blood?

A. No, we don't do that.

Q. What would be the usual examination that might be made to discover whether a patient was suffering from cancer?

A. Well, one of the first things we would have would be an X-ray, or make a microscopic examination, but you do not go through that unless you have symptoms.

Q. You found at the time of making this examination no symptoms that warranted you in making any further examination to find out about any cancer? Is that correct?

A. That is correct.

Mr. Dorn: That is all.

Cross-Examination

Mr. Carroll: Q. Doctor, you have looked at the photostatic copy of the application?

A. Yes, I have it here.

(Testimony of George W. Cox.)

Q. I think you stated that the writing there was your writing. A. That is right.

Q. Where did you obtain the answers to the questions that are written there?

A. At his office, where I examined him.

Q. From whom?

A. From him. I questioned him personally. As a matter of fact, there was no one else there when I examined him.

Q. In other words, Doctor, all of the information contained in this application was given to you by Mr. Quandt? A. That is right.

Q. Now, Doctor, if you had known that Mr. Quandt was suffering from a cancer you, of course, would not have concluded that he was in sound health? A. I would not.

Mr. Carroll: That is all.

Redirect Examination

Mr. Dorn: Q. Doctor, is it possible for a patient to be afflicted with cancer and not know it?

A. Surely, it depends upon how far it has advanced.

Q. Then as I take it he might have cancer and not know it, himself?

A. He could for quite some length of time, that is true.

Q. Doctor, I will ask you did you find any symptoms that indicated at the time you made this examination, which is apparently dated the 13th of

(Testimony of George W. Cox.)

November, 1943, that Theodore W. Quandt had any symptoms of cancer?

A. No, I had no symptoms to make me think that.

Q. At the time you made this examination Theodore W. Quandt, the deceased, was in sound health?

A. As far as I could make out he was, yes.

Q. You are a physician, and you would have discovered it, wouldn't you?

A. You have to go a lot on history, because from the questions you ask he could have it without knowing it, and he could have it without knowing it if he did not give you symptoms that would lead you to think that he had.

Mr. Dorn: That is all.

Mr. Carroll: That is all.

Mr. Dorn: May it please your Honor, we have Dr. Mitchell, who was to be a witness, but he had an operation this morning and told me he would be a little late. As a matter of fact, he is operating on a client of mine, so I happen to know about it, but outside of that the plaintiff will rest.

The Court: Do you want to reserve the right to examine him?

Mr. Dorn: We want to reserve the right to examine him. I understand that he has been subpoenaed by the other side, also, so he will be a witness for both, but we would like to have the right to examine him when he arrives.

Mr. Carroll: That is satisfactory.

Mr. Dorn: The plaintiff rests.

(Plaintiff rests.)

Mr. Carroll: If your Honor please, depositions were taken in Boston of various officers of the defendant company, and we would like to offer them in evidence at this time. I do not know how your Honor would like to proceed with regard to the depositions, read them or deem them read in evidence.

The Court: Are there any objections in them?

Mr. Dorn: There is no objection to the manner in which the depositions were taken. There may be some objections to the questions, but so far as I am concerned they might as well be admitted in evidence.

The Court: I can read them later.

Mr. Carroll: Is there any dispute that the amount of premium paid on this policy was tendered to the beneficiary?

Mr. Dorn: No.

Mr. Carroll: It may be stipulated then that the defendant, here, tendered to the beneficiary, and as a matter of fact also the administratrix of the estate, all premiums which were paid upon this policy at the time that the policy was issued.

Mr. Dorn: That is correct.

The Court: May the depositions be considered in evidence?

Mr. Dorn: Yes, your Honor.

(Thereupon the depositions of Hugh W. Crawford, William L. Sitgreaves, Henry A.

Plimpton and Ralph E. Pierce were introduced in evidence.)

Mr. Dorn: I see Dr. Mitchell has arrived, and I think we had better finish with the direct case, as the doctor is pretty busy.

The Court: All right, you may call the doctor.

V. H. MITCHELL,

called as a witness for the plaintiff; sworn.

The Clerk: Will you state your name to the court, please?

A. V. H. Mitchell.

Mr. Dorn: Q. Dr. Mitchell, you reside in the City and County of San Francisco?

A. Yes, I do.

Q. And you are a duly and regularly licensed physician? A. I am.

Q. To practice your profession in the State of California? A. Yes.

Q. And you have practiced for how many years?

A. Since 1927.

Q. Generally speaking, have you any special line of business?

A. Mostly surgery, industrial surgery.

Q. Do you conduct many examinations for insurance companies and railroads in damage cases?

A. Yes.

Q. Did you know Theodore Quandt in his lifetime? A. I knew Mr. Quandt very well.

(Testimony of V. H. Mitchell.)

Q. When you say "very well," generally what do you mean?

A. Well, I not only knew Mr. Quandt as a patient, but I knew Mr. Quandt as a friend.

Q. You saw him quite frequently during his lifetime, not only as a friend but as a patient?

A. Yes.

Q. Doctor, did Theodore Quandt visit your office and have you any record that he did?

A. Yes, he did.

Q. When was the first time that he called at your office?

A. The first time that Mr. Quandt called at my office professionally was on February 10, 1941.

Q. What was he there for?

A. He complained of a common cold with a cough.

Q. Was there a recovery?

A. He received four physio-therapy treatments and on February 14th he had made a complete recovery.

Q. When you say a complete recovery, you mean by that that there was no disease, in medical terms?

A. To all intents and purposes he was well.

Q. Perfectly well from that ailment?

A. Yes.

Q. The next time that he called at your office was when?

A. I next saw him professionally on June 30, 1942.

(Testimony of V. H. Mitchell.)

Q. What did he call there for?

A. He came in complaining of being tired, he had been working quite hard, and he was given a physical examination which was entirely negative, and his hemoglobin at that time was 80, and he was given a tonic, and I did not see him again until March 11, 1943.

Q. He complained of being tired. Was that what you would term medically as a disease of the body that would have a tendency to shorten his life?

A. No, as I said, he had been working hard and he felt under par in that he was just tired, that is all; he had no specific complaint; he had no pains of any sort any place in his body. It was just a question of tiredness.

Q. You made a thorough examination of him at that time?

A. I gave him a complete physical examination at that time.

Q. When you say the hemoglobin was 80, what do you mean by that?

A. Hemoglobin, which is the coloring matter of the blood, gives an indication of what the blood count really is. Hemoglobin of 100 percent is considered perfect. I believe there are very few of us that have hemoglobin of 100 percent; the average is from 85 to 95; we consider those normal limits. His hemoglobin was 80 percent at that time.

Q. The next time you saw him was when?

A. March 11, 1943.

(Testimony of V. H. Mitchell.)

Q. At that time did you have any conversation with him particularly? A. Yes.

Q. What was that conversation?

A. A friend of his had died of heart disease, and he was worried because he had noticed he had a few pains around his heart. At that time he was again given an examination, and his chest was fluoroscoped and it was entirely negative. His hemoglobin at that time was 85 percent and upon examination his heart and lungs were normal, and he received no medicine or no treatment at that time.

Q. What did these pains around the heart indicate to you professionally?

A. Well, they could have been a nervous pain, they could have been a little spasm of the muscles due to a cold, but there was no indication of any organic disease of his heart or lungs.

Q. At that time his heart was in perfect condition? A. Yes.

Q. There was nothing to indicate that there was any affliction of any kind of the heart?

A. No.

Q. You prescribed nothing for him at the time?

A. No.

Q. That is all you ever heard of his affliction of the heart or examination of the heart?

A. That is right.

Q. When did you see him next?

A. On November 18, 1943.

Q. That was a few days after Dr. Cox's examination?

(Testimony of V. H. Mitchell.)

A. Well, I was not aware of that, but anyway he complained of frequency of urine, two or three times during the day, and he also noticed them two or three times during the night, which was noticeable only when he was nervous. On November 19, after he brought a specimen of urine to the office it was sent to the laboratory and it was completely negative.

Q. What would you attribute that excessive urination to?

A. Well, it is sometimes due to an acid condition of the urine which causes frequency of urination, but which does not indicate that there is any organic disease present.

Q. In this instance it was not any organic disease that caused this urination? A. No.

Q. In other words, as far as your medical examination was concerned you found him at that time to be in sound health? A. Yes.

Q. You made further examination aside from the urine at that time?

A. According to my record here I did not, and I don't know whether I made further examination, or not, and I could not answer that question other than I examined his urine, which was his only complaint at that time.

Q. And the examination of the urine was negative? A. Yes.

Q. And he did not return to you again for any further examination in relation to urination, did he? A. No.

(Testimony of V. H. Mitchell.)

Q. Did you see him frequently around about that time?

A. Yes, I would see him occasionally; he called me up and talked to me on occasion; when he was downtown he would drop down to see me at the office.

Q. Friendly visits? A. Yes.

Q. What would you say, Doctor, with reference to his general health on November 18, 1943, at the time you made your last examination?

A. Well, as far as I was aware at that time Mr. Quandt was in perfect health.

Q. When you say perfect, you mean, you are using the word of the policy, sound health?

A. Yes.

Q. You know the ailment that caused the death, or contributed to the death of Mr. Quandt?

A. I do.

Q. What was that?

A. From what I understood, he had a carcinoma, a cancer.

Q. At the various times you made your examination of Mr. Quandt was there anything, or any indication to you as a medical man that he was afflicted with cancer?

A. No, he never complained of any abdominal pains. He made no complaint of his stool. He made no complaint as to vomiting and never made any complaint about any obstruction. In fact, his complaints, as I have testified, was a cold at one

(Testimony of V. H. Mitchell.)

time, the other was frequency of urination, and the other was a tired feeling.

Q. Now, Doctor, is it possible for a patient to be afflicted with cancer such as Mr. Quandt had and he not know it? A. Yes.

Q. As a matter of fact, isn't it quite common that patients have cancer and do not know anything about it over a long period of time?

A. Yes, it is common, especially with different types of cancer in different areas of the body. For example a man might have cancer of the stomach or large intestine and the only time he will get symptoms of that is a feeling of obstruction, which is probably the first indication of a growth in the lower bowel. The other is that sometimes he may get a frequency of stool, which is another indication of cancer. Mr. Quandt had none of those at all; in fact, he had no complaint with his bowels, whatsoever.

Q. And of course you found no indication at any time in your examination or your visit with him that he was afflicted with cancer?

A. No.

Mr. Dorn: That is all.

Cross-Examination

Mr. Carroll: Q. Doctor, did you testify from some notes there that you have? A. Yes.

Q. May I have a look at them?

A. Yes, you have a copy of these.

Q. This is a letter addressed to Mr. Dorn.

(Testimony of V. H. Mitchell.)

A. Yes.

Mr. Dorn: There is nothing private about it, go right ahead and read it.

Mr. Carroll: Q. Where is the rest of the letter, do you know, or is this all of it?

A. That is all the letter.

Q. I see no signature on it. Is there anything else to it?

A. No, that is all there is to it.

Q. You made this up from your records, did you?

A. Yes. The man from the insurance company, I have forgotten his name, from Boston, he was here, and they came to my office and went over the records with me, and then from the records we typed that out and I gave him a copy of it and I another copy to Mr. Dorn.

Q. Doctor, a man who has a cancer is not in sound health, of course?

A. He is not in sound health, but he might not know he has it.

Q. Now, Doctor, when Mr. Quandt came to you and complained of pain around his heart, that was when?

A. March 11, 1943.

Q. Did I understand you to say you had him fluoroscoped at that time?

A. Yes.

Q. Where was he fluoroscoped at that time?

A. At my office.

Q. Who did that? A. I did that.

Q. When did you fluoroscope him?

(Testimony of V. H. Mitchell.)

A. On that day.

Q. Did you see him again after that?

A. I have no record of seeing him after that date except November 18, 1943.

Q. But on this particular occasion when he came to you and complained of pain around his heart you did fluoroscope him at your office?

A. Yes.

Q. What portion of his body did you fluoroscope? A. His chest.

Q. Does that require disrobing, or not?

A. Yes.

Q. So at that time he was disrobed and was placed in front of the fluoroscope and fluoroscoped?

A. That is right.

Q. The next occasion, Doctor, when he complained of frequency of urination I think you mentioned there was a urinalysis made. A. Yes.

Q. Where was the urinalysis made, Doctor?

A. At the Physicians Laboratory, 515 Sutter.

Q. Did you have him take samples of urine to the office there?

A. No, he brought it to my office and it was sent up to the laboratory, which is on the sixth floor.

Q. That is the sixth floor of the same building you are in? A. Yes.

Q. When did you get your report from the laboratory?

A. Oh, I have forgotten that; it usually takes twenty-four hours to get the reports.

(Testimony of V. H. Mitchell.)

Q. Did Mr. Quandt bring the report back to you or did you get it from the laboratory?

A. Oh, no, the report is not given to the patient, at all, it is sent directly to me.

Q. Did you ever talk to Mr. Quandt again after this visit?

A. I have no record of it; he probably called over the telephone and I probably told him the urinalysis was negative.

Q. His complaint was frequency of urine?

A. Frequency of urine.

Q. At night and in the daytime?

A. Yes, two or three times during the day and two or three times during the night.

Mr. Carroll: I think that is all, Doctor.

Mr. Dorn: No further questions. You may be excused.

That is plaintiff's case, your Honor.

GLORIA QUANDT,

called for defendant; sworn.

Mr. Carroll: Q. Miss Quandt, you are, I believe, the daughter of Mr. Theodore W. Quandt?

A. I am.

Q. And I think, if I remember correctly, your mother passed away sometime prior to your father's death?

A. Yes.

Q. When was that?

(Testimony of Gloria Quandt.)

A. January 26, 1941.

Q. Following your mother's death, where were you residing?

A. I was residing at my home at 26 Hazelwood Avenue.

Q. Your father was residing there?

A. Yes.

Q. Did you continue to reside there after Mrs. Quandt's death? A. Yes, for a time.

Q. Can you tell approximately when you stopped residing there?

A. Yes, around March 15, 1944.

Q. That was approximately three weeks or so before your father's death? A. That is right.

Q. Prior to your father's death, Miss Quandt, did he complain to you of any attacks of nausea, or indigestion? A. How much prior?

Q. At any time during that period.

A. No, he did not. I am referring to everything but the last few days.

Mr. Carroll: I would like to refresh the witness' recollection from a statement which counsel has read.

Q. Miss Quandt, I hand you two sheets of yellow paper dated April 27, 1944, some weeks after your father's death, upon which appears the signature, "Gloria L. Quandt" and I ask you if that is your signature, and your handwriting. A. Yes.

Q. I wonder if you would take this and read it over, Miss Quandt, and see if it refreshes your

(Testimony of Gloria Quandt.)

recollection about what I just asked you. Take your time.

The Court: I think while the witness is reading this the court will take a brief recess.

(Recess.)

Mr. Carroll: Q. Have you read the statement over, Miss Quandt? A. Yes, I have.

Q. And since you signed that statement you have spoken to Mr. Backman? A. Yes.

Q. Mr. Backman, I believe, was an investigator for the Columbian National Life Insurance Company? A. Yes.

Q. He interviewed you and wrote this up and then brought it back to you?

A. No, I was there when he wrote it.

Q. You read it over and signed it?

A. Yes.

Q. In regard to the question I just asked you, as to whether your father had ever complained of having nausea or indigestion, I will ask you if this refreshes your recollection:

“Starting in about the end of August, 1943, my father had attacks of nausea lasting about two days in duration. He didn’t vomit, but just complained of his stomach feeling upset. It was accompanied by feeling of indigestion. These occurred about once every six weeks. Since about the first of the year these attacks of nausea seemed to increase in their periods of duration and seemed to be much more energy-taking.”

(Testimony of Gloria Quandt.)

Now, does that refresh your recollection as to the question I asked you, whether your father ever complained of nausea or indigestion?

A. Well, the word "nausea" as it is stated there was suggested to me by the investigator as the better term at the time. The complaint that my father had at that time apparently was feeling upset, and I must have suggested that it was an upset feeling rather than nausea.

Q. How about the word "indigestion"? Did he complain about indigestion, if you object to the word "nausea"?

A. Well, I don't know whether you would call it indigestion. That is the best word I could think of at that time. It was just that he was feeling upset.

Q. You mean you used nausea and indigestion to indicate worry?

A. That is what I tried to explain, the feeling that he had, and those were terms that he had suggested I use, so I used them; they are not untrue, but they are not complete.

Q. I will ask you direct, Miss Quandt, is it true, as you state here, that prior to your father's death he had attacks of indigestion, if you object to the word "nausea", lasting about two days in duration, which increased prior to the time of his death?

A. Would you repeat the question?

Q. Is it true that prior to your father's death he suffered from attacks of indigestion lasting ap-

(Testimony of Gloria Quandt.)

proximately two days and which increased until the time of his death?

A. Not actual indigestion, but upset feeling. That is the only way I could answer it.

Q. Did he complain of an upset stomach to you?

A. No, upset condition from worry, not an upset condition from physical condition.

Mr. Carroll: I would like, if the Court please, to offer this statement in evidence. The witness has said she signed it following a conversation with Mr. Backman, an investigator for the company.

Mr. Dorn: I think, if your Honor please, as the witness is on the stand the statement is not admissible in evidence. She has explained what her statements were.

Mr. Carroll: There will have to be something in the record to show what she was talking about. It had better be marked in some manner so that the witness' testimony as to what she is referring to will be intelligible.

The Court: I will allow it to be marked in evidence. It will be Defendant's Exhibit B. I have marked the depositions Exhibit A.

(The document was marked Defendant's Exhibit B.)

Mr. Carroll: Q. Did your father have any complaint at all, Miss Quandt?

A. During which period are you referring to?

Q. Prior to his death.

A. I believe it is in the statement, general malaise—complaints of general malaise.

(Testimony of Gloria Quandt.)

Q. How long did they have this complaint of general malaise?

A. You mean the period of time it began?

Q. Beginning when?

A. In the fall of the year.

Q. Approximately when?

A. In September.

Q. Beginning in September or after September?

A. Thereabouts, I would say.

Q. You state here, "Starting in about the end of August, 1943, my father had attacks of nausea." Is that about the time the attacks of malaise began?

A. Yes.

Q. How often did those attacks of malaise continue?

A. About every six weeks, or something like that.

Q. How long did they last?

A. One or two days.

Q. They lasted one or two days?

A. Yes, approximately.

Q. Would you define as well as you can what you mean by "malaise"? I notice that term is in here. That is your term and not the investigator's term?

A. Yes.

Q. Will you state what you mean by that?

A. Will you let me describe the entire situation?

The Court: Go ahead.

A. Well, to begin with, in addition to his business troubles we had some very difficult situations at home, and I, myself, was in no better condition mentally; they were difficulties of a nature that

(Testimony of Gloria Quandt.)

would cause upset feelings and worry, not nausea that comes from over-eating or anything like that, but nervousness that would cause an upset feeling.

Q. Tell us what the facts were as to the difficulties?

A. You mean pertaining to the upset at home?

Q. You have been describing that as due to conditions at home.

A. I will say without getting too personal, difficulties with my own residence at home.

Q. You are talking now about the case of your father's remarriage?

A. Yes, that is right. In general, we did not get along at home, and it became very, very difficult, and naturally my father, being a family man, in a situation like that he certainly did not want his home broken up, and it caused him a great deal of worry, as it did myself, I suppose it would in a family, he was worried over it, he was concerned with it, and together with the situation at home there was difficulty in getting his business straightened up, which caused a natural reaction.

Q. You observed that your father was not well and had some physical discomfort and got nauseated and you interpreted it to those conditions that existed?

A. I do not say that he was sick physically, I say it was a feeling that comes along with a general upset, it was not a physical condition.

Q. Your father did complain to you of being nauseated but you ascribed that as a general result

(Testimony of Gloria Quandt.)

of all of these conditions that existed, is that what you are trying to say?

A. I do not think I get my point over. I am not saying he was nauseated. I interpreted it to this upset feeling that he had. I cannot describe it any more.

Q. Let me ask you if this is true: "I don't recall him taking any medicine for the nausea as described about. He would either go home and lie down or lie in the sun for a time until he felt better."

Did your father go home and lie down when he had these attacks?

A. Yes, when he was tired he went home.

Q. Is this statement true: "He didn't vomit but just complained of his stomach feeling upset."?

A. Yes, that was true.

Q. Now, I think you stated that you noticed these symptoms coincident, he made these complaints to you coincident with some marital or domestic difficulty in that time?

A. Yes.

Q. Did I understand you to say your father remarried?

A. Yes.

Q. What was the date of his remarriage?

A. January 11, 1942.

Mr. Carroll: I think that is all.

Cross-Examination

Mr. Dorn: Q. Miss Quandt, when you used the word "nausea" who gave you the word to use in this statement?

A. The investigator.

(Testimony of Gloria Quandt.)

Q. He told you to use that word and that is why you did?

A. I described his condition and said I didn't know how to word it.

Q. He called it that? A. Yes.

Q. And this domestic trouble that you were talking about, in short, was that because Mrs. Quandt had already filed a suit for divorce against your father? A. Yes.

Q. She left home? A. Yes.

Q. And remained away? A. Yes.

Q. And subsequently they patched up their difficulties, we will say, and it was during that period of time that this divorce was going on, and when Mrs. Quandt moved away from the place, is that correct? A. Yes.

Q. And would you say that during that space of time your father was extremely nervous?

A. Yes.

Q. And you attribute that nervousness to difficulty in his business and family troubles at home?

A. Yes.

Q. Did you ever observe at any time your father vomited? A. No.

Q. Did he ever complain to you, other than what you have stated already, of having any difficulty with his heart? A. No.

Q. And of course he did not complain of any pain from the abdomen or in the lower bowels?

A. No, he did not.

Q. You saw your father every day?

(Testimony of Gloria Quandt.)

A. Yes, I did.

Q. And during that same time, from your observation and from conversation with your father, did he say he had any other ailment, other than a cold or something of that character? A. No.

Q. Did your father have any particular hobby on the ice cream side? A. Yes.

Q. And after eating ice cream his stomach was upset? A. Yes.

Q. Was there any other food that he would eat that would upset his stomach?

A. Anything in the sweet line, anything of that type he could not eat excessively, he could not over-eat excessively.

Mr. Dorn: I think that is all.

Redirect Examination

Mr. Carroll: Q. Miss Quandt, might I ask you your age?

A. I am nearly twenty.

Q. The word "indigestion" is a strange word to you? A. Yes.

Q. I am quite doubtful as to what your testimony has been. Do I understand you to say that the complaints you have been referring to were complaints following eating of ice cream?

A. No, that is referring to occasional upsets.

Q. This is something else?

A. I am distinguishing in my mind between a physical upset and an upset from a mental condition.

(Testimony of Gloria Quandt.)

Q. In other words, you are distinguishing between a nausea or upset stomach which you say was caused by your father's mental condition and another experience that came from eating ice cream or something of that sort? A. Yes.

Mr. Carroll: That is all.

MRS. ALICE QUANDT,

called for the defendant; sworn.

Mr. Carroll: Q. Mrs. Quandt, you were the wife of Mr. Theodore W. Quandt?

A. Yes.

Q. Will you say "Yes" or "No," so the reporter can hear you? A. Yes.

Q. The residence of yourself and Mr. Quandt was at 26 Hazelwood Drive? A. Yes.

Q. Were you living there with Mr. Quandt?

Mr. Dorn: Just a minute, we are going to object to any testimony being given by Mrs. Quandt, under section 1881 subdivision (1) of the Code of Civil Procedure, which in short prohibits a wife from testifying against a husband in any matter except a few certain cases, exceptions, and this is not one of the exceptions. The section of the code that I am referring to states there are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate, and therefore a person cannot be examined as a witness in the following cases, 1, a husband cannot be ex-

(Testimony of Mrs. Alice Quandt.)

amined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either during the marriage or afterwards be without consent of the other examined as to any communication made by one to the other during the marriage.

Mr. Carroll: The question I asked was this: Were you living with Mr. Quandt at 26 Hazelwood Drive in 1943?

A. Yes, from September on.

Q. From September on? A. Yes.

Q. Now, were you aware of Mr. Quandt arising at night for the purpose of urinating?

A. No, I was not.

The Court: She has answered she was not, so you can't be hurt by that.

Mr. Carroll: That is all I wish to ask the witness, unless you have some questions.

Mr. Dorn: No, I have not. If I asked her one then the objection would be no good.

Mr. Carroll: If your Honor please, I have two other witnesses who are doctors, one of whom I arranged to have here at two o'clock and one at two-thirty.

The Court: Very well, we will take a recess until two o'clock p.m.

(Thereupon a recess was taken until 2:00 o'clock p.m.)

Afternoon Session, January 23, 1945

2:00 p.m.

The Court: You may proceed.

Mr. Carroll: Dr. Bostick, will you take the stand please?

DR. WARREN L. BOSTICK,

called for defendant; sworn.

Direct Examination

Mr. Carroll: Q. Doctor, you are a physician and surgeon?

A. Yes, I am.

Q. Licensed to practice in the State of California? A. Yes.

Q. Do you hold an official—I withdraw that.

Q. You are, I believe, Doctor, the official deputy surgeon for the coroner in this City and County of San Francisco? A. Yes.

Q. Are you connected with one of the universities, also, Doctor?

A. University of California.

Q. In what capacity?

A. I am in the Department of Pathology there, instructor.

Q. Is that your specialty, Doctor, pathology?

A. Yes.

Q. Generally speaking, what branch of the science is that?

A. Well, that is a branch of medicine that lends itself entirely to establishing causes of death and of

(Testimony of Dr. Warren L. Bostick.)

studying the background of diseases, and also has a limited amount to do with laboratory work in general.

Q. Doctor, in your official capacity as deputy surgeon, did you have occasion to perform an autopsy on the body of Peter W. Quandt, to determine the cause of his death? A. Yes, I did.

Q. Will you state to the Court, Doctor, what you determined to be the cause of his death?

A. I did a complete examination on the body and upon opening the abdomen I saw immediately a diffused inflammation of all the abdominal contents; and further examination revealed a large mass in the region of the right portion of the abdomen, and this mass was a cancer, which cancer had spread, not only from the right side of the bowel but I also found it distributed and small nodules all through the liver. The cause of death was a rupture of this cancer mass into the free abdominal cavity, with generalized inflammation.

Q. Doctor, can you give us an idea of the size of this cancer?

A. Well, as I examined it, the mass involved an area with a diameter of approximately six inches. It completely obliterated almost all the structure of the bowel on the right side, the large bowel.

Q. Doctor, how many of these autopsies have you done, approximately?

A. About three thousand.

Q. Basing your opinion, Doctor, on your experience and learning, can you indicate to the court

(Testimony of Dr. Warren L. Bostick.)

approximately how long that cancer had been there, or when it had commenced?

Mr. Dorn: That is objected to as irrelevant, incompetent, and immaterial.

The Court: Objection overruled.

A. That cancer had been there at least a year, based on what I have seen in a good many years of cancers, and from the general feeling that it takes a cancer approximately one year to completely surround a segment of the bowel; and this had, of course, much more than done that. It had invaded extensively into the surrounding tissue, and had also spread into the liver.

Mr. Carroll: Q. You say, Doctor, it had been there a minimum of a year?

A. Correct.

Q. In your opinion might it have been there longer? A. It could have been.

Q. Doctor, the date of your examination I believe was the same day the death occurred?

A. I examined the patient on April 2, 1944.

Q. Now, Doctor, will you state to the Court what significance you would attach in a case of a man 52 years of age to recurring complaints of attacks of indigestion?

A. That is somewhat of a big question——

Q. Maybe I could limit it a little bit, Doctor. It covers quite a scope. A. Yes.

Q. If you were trying to determine, Doctor, the cause of a complaint of that nature in a man of

(Testimony of Dr. Warren L. Bostick.)

that age, what causes would you be likely to anticipate?

A. In a man of the age of Mr. Quandt, in his fifties, of course, a history of persistent or recurrent nausea, or what he might even have termed an indigestion—a certain sourness of the stomach, if you wish, naturally would soon bring to the mind, or I mean might bring to the mind the question of a budding carcinoma in the background; and in order to rule out a cancer—that is the same thing as carcinoma—the problem of ulcers of the stomach and problem of heart disease. Those are three big factors that would always come to mind in dealing with a man of that particular age group.

Q. That symptom would be indicative of the possible existence of any one of the things you have mentioned?

A. That would be one of the common signs of those conditions, yes.

Mr. Carroll: You may cross-examine.

Cross-Examination

Mr. Dorn: Q. At the time you examined the body you examined it with reference to all the other vital organs, did you not?

A. Everything excepting the head.

Q. Did you examine the heart?

A. Very carefully, yes.

Q. Did you find it in a normal condition?

A. Yes, in an entirely normal condition for a man of his age.

(Testimony of Dr. Warren L. Bostick.)

Q. That is what I mean, of course.

A. Yes.

Q. There wasn't anything of a diseased character about the heart, was there? A. No.

Q. Did you examine the lungs? A. Yes.

Q. Did you find anything of a diseased character with reference to the lungs?

A. Not in the ordinary sense. The lungs were not well aerated.

Q. Were not well what?

A. Didn't have too much air in them, due, presumably, to the pressure from the diaphragm, because his abdomen was extended. But other than the partial pulmonary collapse his lungs had no disease.

Q. And you examined the liver? A. Yes.

Q. What did you find with reference to that, I mean as far as disease was concerned?

A. Disease—the findings in the liver were quite pertinent to my general interpretation in that the liver had studded through it many nodules of obvious cancer tissue, measuring in diameter from approximately a half inch to three-quarters inch in diameter, indicating that there must have been a cancer to be found some place, and it had already diffusely spread into the liver system.

Q. And you examined the kidneys, also?

A. Yes.

Q. Did you find anything diseased with reference to them? A. No.

(Testimony of Dr. Warren L. Bostick.)

Q. Now, these cancers do not all grow or extend themselves with the same rapidity, do they?

A. No, there is a certain variation.

Q. And in some instances they grow very rapidly and others they grow very slowly?

A. Within limitations.

Q. Well, now, what do you mean by limitations? We are all laymen here.

A. Well, you can—no cancer will spread—you say very rapidly—no cancer would spread from a site to the whole body over night. That might be considered very rapidly. That is an impossibility. No cancer, or practically no cancer would affect—or, to put it another way, no cancer could be so slow that it would never spread, because if that were the case it would not be a cancer. Therefore, it lies within those two extremes.

Q. Well, if the patient was nauseated or had indigestion a few times over a period of five years previous to his death, would you say that that was an indication of cancer?

A. If I knew nothing else about it and it was put in such a casual way—a few times—by that I presume this nausea only occurred, from the intimation of your question I would assume it only occurred in a day, I would admit that over a period of five years I would not be alarmed.

Q. Would a medical examination of the patient indicate that he had a cancer if this examination had taken place on November 18, 1943, having in mind that his death was the 2nd of April, 1944?

(Testimony of Dr. Warren L. Bostick.)

A. It is my feeling that a careful medical examination at that time could have easily have revealed the presence of a mass on the right side of the abdomen to the exploring hand; and certainly one, if it was based upon any suspicion, at all, would have elicited by the use of laboratory procedure or more particularly X-rays.

The Court: You say that would have disclosed itself in November, 1943?

A. That was about five months before the patient's death?

The Court: Yes.

A. At that time the proper X-rays would have very, very easily demonstrated this.

Q. I mean, do you think a doctor should have discovered that in November, 1943?

A. I wouldn't have been at all surprised if that could have been discovered by careful medical examination. This man was not obese; he was—he—a 52-year-old man—Of course, a cursory physical examination might have missed it. That goes without saying, if you don't look.

Mr. Dorn: Q. If a patient was afflicted with cancer how soon from the time of this affliction would it probably produce nausea or indigestion?

A. That is awfully difficult to answer fairly. Nausea and the feeling of biliousness, if you wish, is a manifestation of what we know as reversed peristalsis. That is, the bowel when it has an irritating substance in it—a tumor or in the case of a gall bladder or stones; in the case of this irritating

(Testimony of Dr. Warren L. Bostick.)

mass the bowel will go into periods where the peristalsis, instead of moving normally upon the bowel, reversed. During those periods of the reversed peristalsis, the patient feels a sensation of nausea—he doesn't have to vomit—of general billiousness, so-called. Just exactly when this reversed peristalsis might appear is difficult to say, but it could very easily be quite early in the presence of any tumor or any inflammation or in, for instance, gall-stone, so I can't answer the question too specifically. I would expect it to be relatively early.

Q. When you say early, within what period of time before, we will say, his death? We will confine ourselves to this particular patient now.

A. This particular patient, from what I know of his tumor, I wouldn't—I would not have expected any sensation of nausea to have been present more than two years before his death, due to the cancer.

Q. Well, if he had no nausea prior to about four months or three months before his death——

A. I beg your pardon.

Q. If he had no nausea prior to about four months or three months before his death, what would you say with reference to that?

A. Well, if you will remember my comments a moment ago, of the irritability or the tendency of a bowel to go into these upsets of reversed peristalsis is a factor entirely of bowel irritability. I mean, some people have a very sensitive bowel that will respond to a minimum of stimulation. Some people, of course, have a very sluggish bowel which takes

(Testimony of Dr. Warren L. Bostick.)

a great deal to arouse it into a state of irritability. If this man had only experienced his nausea as recently as three or four months I would say that in all probability he had a bowel that was not particularly sensitive to the tumor which was obviously present at that time.

Q. And you would say that that is perfectly possible to have occurred in this particular instance, now?

A. Well, no, I don't think it is. It is remotely possible. It is unlikely for a tumor of that size not to have caused definite nausea and vomiting well before a period of two months before his death. I would much prefer to say that he had probably had it for six months or even longer, but that can't be said positively.

Mr. Dorn: That is all.

The Court: Doctor, let me ask you a question: With a man in the fifties, the very presence, having indigestion or attacks of indigestion—in fact, busy businessmen have it, don't they, without expecting the presence of malignancy?

A. That is a fair comment.

Q. You have to have some persistency of a regular nature before you would attribute that sort of a symptom to malignancy?

A. Your point is good. Namely, one has to be practical about this. Naturally, you can't examine everyone who has a little nausea for a cancer. However, remember this is not a young man—52, even though we would like to say it is young, it is defi-

(Testimony of Dr. Warren L. Bostick.)

nitely within the cancer age, No. 1; and No. 2, when I answered the question I indicated that I would not be alarmed unless nausea had persisted for a few days. If it persists on repeated occasions for a period of three or four days that is news. If it just follows a particularly difficult day at the times when you are upset, that is not news. Your point is well taken.

The Court: Anything further?

Redirect Examination

Mr. Carroll: Q. Doctor, I think one of the questions I asked you was this: That if you were attempting to eliminate possible causes of recurrent attacks of indigestion, one of the things you would suspect medically was a cancer, is that true?

A. Yes, recurring attacks, recurring unexplained attacks of indigestion in a man of this age would of necessity force the good physician to consider the three or four diseases I mentioned, cancer, or heart disease, or perhaps an ulcer, things of that type.

Q. If a doctor had been informed of this condition and was making an examination to determine if there were any underlying pathology causing this, that is one of the things he would examine?

A. Positively.

Q. Doctor, I think you stated an examination would have revealed this cancer, in your opinion; is it fair to state that that would depend in part on the type of examination?

(Testimony of Dr. Warren L. Bostick.)

A. Of course. I would have to even say it would have to be a careful examination.

Q. What I had in mind particularly is this, Doctor: Would it make any difference whether you were doing the examination with knowledge of the attacks and attempting to eliminate the cause, or if you were making the examination without any knowledge of any history of attacks of indigestion?

A. Well, I think it would make a difference. That goes without saying, with such history you would suspect or at least have in mind some sort of tumor mass, and, of course, tumors of a serious nature are more than serious within the abdomen, and in such cases your attention would be directed to the abdomen. Without any history you might be diverted to other things, so perhaps you would not examine the abdomen at all.

Q. Doctor, is there any question in your mind, basing your answer on your experience and learning, that this cancer existed in this man in November, 1943, approximately five months prior to his death?

A. Oh, absolutely no doubt. There is not the slightest possibility that there was no cancer there. There is, positively.

Mr. Carroll: That is all, Doctor.

Recross-Examination

Mr. Dorn: Q. Doctor, if this Peter Quandt was your friend and patient and he called upon you professionally on February 10, 1941, and you

(Testimony of Dr. Warren L. Bostick.)

treated him for a passing difficulty from which he recovered in a day or so——

The Court: You don't mean 1944, do you?

Mr. Dorn: I am going to give him all of them, your Honor.

The Court: I think you mean February, 1943, don't you?

Mr. Dorn: No. The difficulty he treated was February 14, 1941. I have the doctor's statement.

The Court: Oh, 1941.

Mr. Dorn (Continuing): ——and if the next time you saw him professionally was June 30, 1942, in which the patient complained of being tired, and you made a thorough examination and found nothing the matter with him, and the next time the patient called upon you was March 11, 1943, at which time the patient told you that a friend of his had died of heart trouble and that he had some little pains about his heart, and the doctor, or you made a very thorough examination, fluoroscope and everything else that goes with it, and found nothing; and the next time was November 18, 1943, and the patient complained of urinary troubles, having to urinate more often lately than ordinarily, and the doctor, or you prescribed nothing, and that passed away, would any of those examinations, or any of those matters that I have called to your attention cause you to have a suspicion or an idea that the patient was afflicted with a cancer?

A. No, I can't say that that would. I would have only asked to keep in contact with him. Oh, no.

(Testimony of Dr. Warren L. Bostick.)

Q. I am giving you the examinations as they occurred.

A. From what you state I would say not specifically.

Mr. Dorn: That is all.

Mr. Carroll: That is all, Doctor.

The Court: That is all. You may be excused.

Mr. Carroll: Doctor Heron, will you take the stand, please?

DR. C. IVAN HERON,

called for the defendant; sworn.

Direct Examination

Mr. Carroll: Q. Doctor, you are a physician and surgeon?

A. I am.

Q. Duly licensed and qualified to practice in the State of California? A. I am.

Q. How long have you been practicing, Doctor?

A. Since 1924.

Q. Are you connected with or employed by any insurance companies, Doctor? A. Yes.

Q. And by whom?

A. West Coast Life Insurance Company, as medical director.

Q. How long have you been employed by the West Coast Life? A. Since 1924.

Q. And in what capacity did you first associate yourself with them, Doctor?

(Testimony of Dr. C. Ivan Heron.)

A. As assistant, then associate, and finally medical director.

Q. So that you have been with them approximately 24 years, is that correct, in that capacity?

A. No, about twenty years.

Q. Now, what are your duties as medical director, Doctor?

A. All of the applications which have any medical questions are referred to me for settlement before the policies are—before the applications are approved and the policies issued.

Q. By that you are referring to applications for insurance?

A. That is right.

Q. And in the West Coast Life Insurance Company?

A. That is right.

Q. You pass upon them from a medical viewpoint, as to whether the policy should be issued?

A. That is right.

Q. Are you engaged in that capacity at the present time?

A. I am.

Q. Now, Doctor, are you a member of any societies or organizations of medical examiners of doctors?

A. Yes, two: The Association of Life Insurance Medical Examiners and the Medical Section of the American Life Convention.

Q. And those are composed of other men in other companies in the same capacity as you are in?

A. That is right.

Q. Are you familiar with the practice of life

(Testimony of Dr. C. Ivan Heron.)

insurance companies generally in passing upon applications where medical questions are involved?

A. Yes.

Q. Doctor, I ask you to assume the case of a man 52 years of age who has made application for \$15,000 of insurance on his life; if an application made by such a person, Doctor, revealed that within eight months prior thereto he had consulted a doctor for complaints of pain about his heart, what would be the practice of insurance companies generally in passing upon such an application?

Mr. Dorn: Just a minute. That is objected to as being irrelevant, incompetent, and immaterial, hasn't anything to do with this action.

The Court: How is that—isn't that a question for the court? How would that aid the court in deciding the case?

Mr. Carroll: The case of Boyer v. U. S. F. & G., 206 California, I think the leading case on that in California, establishes the rule that the direct method of putting that question is the one exception, and that that is admissible testimony, as to what the practice of insurance companies generally is. I don't want to anticipate the witness' answer.

The Court: It may not have been the practice—but you are tying it in with a deposition where they said they followed the general practice.

Mr. Carroll: Yes. In other words, the witness cannot testify that the records and concealments were material or the question is material. That is a question for the court. He cannot testify, of

(Testimony of Dr. C. Ivan Heron.)

course, as to the practice of his own company, because that would be immaterial, but he can testify as to what the established practice of companies generally is.

The Court: Well, I don't know whether this would be—that the court would feel inclined to pay much attention to this. I don't say that in a facetious way. But after all the issue in this case is whether or not there was a material concealment.

Mr. Carroll: The only thing is this: It is regarded as proof—at least in the decisions I have regarded, as proof if the matter concealed is material. In other words, if this information that was concealed had been presented to the company, and it is the practice of all companies generally—

The Court: On that theory, however, if you say the court has to determine that, then you are sort of turning the court off from the opportunity of determining that, except as to weighing the evidence as to whether or not that is the correct practice.

Mr. Carroll: Of course, our position is this, your Honor, and perhaps there is a certain inconsistency to this extent—our position is that, and I am convinced that it is the law in this state, that where specific inquiry is made in an application for insurance, a written inquiry and a written answer is asked, that that is material as a matter of law, that is, as a matter of law concealment if the matter is not disclosed. Therefore, in this particular case,

(Testimony of Dr. C. Ivan Heron.)

as to concealment of having consulted a physician for the heart attack, that is a concealment of a material matter.

The Court: We will come to that later. I don't know whether the evidence shows that.

Mr. Dorn: I might say——

The Court: But I think to save time, we haven't any jury here, I will allow the question. Then you may make your motion to strike it out, and I will have it under consideration in the case, itself. We will save a great deal of time in doing it that way. We don't have to worry about whether the jury is going to hear something it should not. I will overrule it, and it will be subject to a motion to strike. You need not make the motion. I will consider that you have; if this testimony is vital to the decision of the case then I can rule on the motion.

Mr. Carroll: Would you read the question, please, Mr. Reporter?

(Question read by the reporter.)

Mr. Carroll: Answer the question.

A. In the first place, the insurance companies would require a report from the attending physician, and the general usages requiring an electrocardiogram to rule out any possible heart diseases, especially in a man 52 years of age, with any kind of chest or upper abdominal pain.

The Court: Suppose the attending physician told you there was nothing at all the matter with the man's heart, that it was some passing disturbance

(Testimony of Dr. C. Ivan Heron.)

of some kind, would you still have the electrocardiogram?

A. Yes, we would.

Mr. Carroll: Q. Doctor, assuming the same case, that the application had disclosed that this man had been obliged to arise at night to pass urine, what would be the practice of insurance companies with to such a matter in the application?

A. Again, to inquire specifically from the attending physician and to require one or more specimens of urine for home office examination, to determine the possibility of infection in the bladder, prostatic trouble, or kidney trouble.

Q. And in the same case, Doctor, assume that for a period of at least months before this application was made that the application had disclosed that the applicant had been suffering from recurring attacks of indigestion or nausea lasting for almost two days in duration, what would be the practice of companies generally in passing upon the application in that regard?

A. With the history of recurring nausea in a man 52, and the occurrence of heart or chest pains, the usual procedure is to defer action on that man's application for a long enough period of time to establish if anything were developing or not. We would require a special report from the attending physician, and would send our own doctors back as a rule for a very careful examination of the abdomen; relying a great deal on the history as given at the time of the application.

(Testimony of Dr. C. Ivan Heron.)

Q. Doctor, the purpose of these further checks is what?

A. To rule out organic disease. And in that, in a man 52, we would think especially of a cardiac thing first, the heart thing first, then we would think of an ulcer or cancer or other organic disease in the abdominal tract giving him the nausea, and that in association with frequency of urination calls for quite a bit of investigation.

Q. Is it fair to state, Doctor, that the practice of insurance companies generally in such a situation as I have mentioned to you have been not to issue a policy until a further investigation had been made to remove the possibility of any underlying pathology?

A. I don't believe any insurance companies with the symptoms you have set forth would have issued a policy without a very careful investigation.

Mr. Carroll: You may cross-examine.

Cross-Examination

Mr. Dorn: Q. In this same case as counsel has described if the examining physician, making his examination for this policy of insurance, made a very thorough examination and determined that the patent was in perfectly sound health, would your company, or the practice of your company be to issue the policy?

Mr. Carroll: If the Court please: In the interest of letting the question state all the facts, I am not certain, myself, whether counsel means to include

(Testimony of Dr. C. Ivan Heron.)

in his question the case where the information has been disclosed or not disclosed.

Mr. Dorn: I am taking the testimony of the witness, Dr. Cox.

Mr. Carroll: You told the witness to assume the same case.

Mr. Dorn: I am assuming the case Dr. Cox examined and testified about.

Mr. Carroll: It is purely in the interest of clarity.

The Court: The answer to that is they did issue the policy.

Mr. Dorn: He is testifying to what the company's practice was. I am asking him if under those conditions his answer would be they would issue the policy.

The Court: I assume his answer would be "Yes" to it.

A. If we had no further medical examination.

Mr. Carroll: The only reason I make the objection is taking the same case——

The Court: I understand what your point it. I think what Mr. Dorn has in mind, if his company or companies generally had the same report that this company had from its doctor they would have written the policy, too.

Mr. Dorn: That is it.

Mr. Carroll: In the absence of this information.

Mr. Dorn: Q. If it had been disclosed that this patient had visited his own physician and had told his own physician a friend of his had died of

(Testimony of Dr. C. Ivan Heron.)

heart trouble and he had a few pains around his heart, and the physician gave him a very thorough examination and found nothing the matter, with the fluoroscope and all the other things that go with it, would the practice of your company be not to issue that policy when they found——

A. (Interrupting) As far as my company goes, with the history of chest pains, if the doctor had not taken a cardiogram we would have gone further into it and requested a cardiogram, or obtained one ourselves.

Q. In the event that those chest pains disappeared in a day or two days and never occurred again, would you have still issued the policy, in the practice of your company, or not?

A. If a cardiogram were negative and we had no history of indigestion.

Q. Now, just confine yourself to my question, don't put anything else in it.

A. If the electrocardiogram were negative and we were very well satisfied there was nothing in the chest, yes.

Q. And I might add that the hemoglobin was at 85 per cent, heart and lungs by examination were negative, no medicine was prescribed; if you had those facts before you would your company have issued the policy?

A. Not with the history of chest pains without a cardiogram, because physical examination of the heart does not disclose coronary diseases and angina pectoris.

(Testimony of Dr. C. Ivan Heron.)

The Court: Sometimes it isn't even disclosed with a cardiogram?

A. Quite true.

Mr. Dorn: Q. If you had learned or it had been disclosed to you that because of family troubles, a divorce in the family and a lot of business troubles the man had gotten particularly nervous, and while he was nervous he had slight indigestion, and he told you that, would your company have issued the insurance?

A. That is the type of risk we looked over carefully because angina pectoris is particularly born and grow on nervous trends, particularly coronary diseases.

Q. With the case of nervousness I have described, would you still have issued the policy, or not?

A. After we had obtained a negative electrocardiogram, yes, provided the cause of nervousness had been removed.

Q. Well, if the urine examination showed negative would your company still have refused to issue the policy?

A. Is your question just referring to the urinary examination?

Q. Let me withdraw the question. I think I started wrong. In the event that it was disclosed that the patient was obliged to arise a time or two at night and during the daytime urinated more than usual, which lasted for a period of three or four days, but if the examination by his physician

(Testimony of Dr. C. Ivan Heron.)

showed—examination of the urine showed that the urine was negative, would your company still refuse to issue a policy?

A. Not provided we had a report from the attending physician.

Q. I am assuming you have those facts I am giving you now. That is why we ask the question in that way. I think that is all.

The Court: Anything else?

Mr. Carroll: That is all, Doctor.

The Court: You may be excused, Doctor.

Mr. Carroll: That is our case, your Honor.

The Court: Let me ask one fact that I didn't make a note of, and I want to be sure of it: The last consultation of the decedent with Dr. Mitchell was after the examination had by the insurance doctor, wasn't it?

Mr. Carroll: Three days after.

Mr. Dorn: Three days after.

The Court: Is there any law involved in this case?

Mr. Dorn: Yes, your Honor. I am satisfied that what counsel just told you, what he says is the law is wrong. For that reason I think there is law involved.

The Court: I mean, isn't this just a question of fact as to whether or not there was some material concealment that the insurance company—that entitled the insurance company not to pay this policy?

Mr. Dorn: They have got two things to prove,

your Honor: That there was a material concealment, and the next thing is that the patient actually had knowledge of it and concealed that fact.

The Court: What I am trying to find out, is there any question of law involved in this matter, as far as the defendant is concerned?

Mr. Carroll: I think there is, your Honor. I will tell you what I think it is.

(Thereupon followed a discussion between the court and counsel, at the conclusion of which the defendant was given ten days within which to file a memorandum, and the plaintiff an equal length of time, if he so desired.)

[Endorsed]: Filed Sep. 24, 1945.

DEPOSITIONS OF HUGH W. CRAWFORD, WILLIAM L. SITGREAVES, HENRY A. PLIMPTON, and RALPH E. PIERCE, taken on behalf of the Defendant, upon written interrogatories, before Emilie Burford Murray, a Notary Public within and for the Commonwealth of Massachusetts, pursuant to Stipulation between counsel for the plaintiff and counsel for the defendant, which is hereto annexed, at the offices of The Columbian National Life Insurance Company, 77 Franklin Street, Boston, Massachusetts, beginning at 2:05 o'clock p. m., on Wednesday, November 15, 1944, and concluding at 12:45 o'clock p. m., on Thursday, November 16, 1944.

Examining Room, Home Office, The Columbian National Life Insurance Company, 77 Franklin Street, Boston, Mass., Wednesday, November 15, 1944, 2:05 p. m.

WILLIAM L. SITGREAVES,

a witness called on behalf of the defendant, having been first duly cautioned and sworn, deposes and says as follows:

In Answer to Direct Interrogatories Submitted to the Notary Public to Be Propounded to the Witness

Q1. Please state your full name, age and place of residence.

A. William Leland Sitgreaves, age 44, 1558 Massachusetts Avenue, Cambridge, 38, Massachusetts.

Q2. What is your occupation or profession?

A. Chief underwriter of The Columbian National Life Insurance Company.

Q3. If you are a physician, please state of what school of medicine you are a graduate, the time of your graduation, and outline briefly your professional activity since the time of your graduation.

A. I am not a physician.

Q4. By whom are you employed?

A. The Columbian National Life Insurance Company.

Q5. In what capacity are you employed, and for how long have you been employed in that capacity?

(Deposition of William L. Sitgreaves.)

A. As the chief underwriter, and in that capacity continuously during the last five years.

Q6. Please state the nature of your duties in the capacities in which you are employed.

A. They are primarily to pass upon the applications for life insurance, to determine the eligibility of the applicants for issue of the amount and plan of insurance requested, and to determine whether the applicant qualifies for insurance at standard rate or at one of the various sub-standard premium classifications. If the risk appears to be sub-standard, it is also part of my duties to determine into which sub-standard classification the particular risk falls.

Q7. Who in The Columbian National Life Insurance Company has the duty of final approval or disapproval of applications to said company for life insurance?

A. That depends upon the size of the case. By "size" I mean amount. For a case of this size the approval must be given by the medical director, the chief underwriter, and the actuary.

Q8. What has been your general training and experience in this line of work, and particularly in connection with the underwriting, acceptance or rejection of life insurance risks?

A. I have been in the life insurance business for nearly 22 years. With the exception of the first year and a half all of my time has been devoted to life insurance underwriting. The first ten years

(Deposition of William L. Sitgreaves.)

were spent in the home office underwriting department of the Aetna Life Insurance Company at Hartford, Connecticut. The next seven years were spent as the manager of the underwriting department of that company's New York City agencies. And during the last five years I have been the chief underwriter of The Columbian National Life Insurance Company in Boston.

Q9. What has been your general experience with regard to the usual practice of life insurance companies as to the underwriting, acceptance and rejection of life insurance risks pertaining to policies of life insurance?

A. As I understand the question, the information desired is as to my knowledge of the practices of life insurance companies in general. I am familiar with those practices through membership in the Home Office Life Underwriters Association, through inter-company correspondence and discussions, and in particular because of The Columbian National's practice of accepting re-insurance from other companies. Because of this acceptance of re-insurance I have had ample opportunity to review the underwriting papers and decisions on particular cases of many of the life insurance companies operating throughout the United States.

Q10. If you are familiar with it, please state what is the practice of life insurance companies generally with respect to the underwriting, acceptance, and rejection of life insurance risks.

A. My understanding of that question is that

(Deposition of William L. Sitgreaves.)

what is desired is a general idea of the standards employed by companies. Naturally these vary somewhat from company to company. Some companies pursue a very liberal underwriting practice, while others follow a much more rigid practice. In between these extremes there are many companies whose practices are about midway or possibly inclining toward either of the extremes. Then too the practices of a company may vary from time to time. By that I mean, that during a period following favorable mortality experience and general progress in the business a company may be more lenient than the average, but in later years may adopt a different practice and become more conservative. It is also possible that a company which has been following a conservative practice may at a later period become more lenient, particularly as to certain classes of risks. As an example of the last point, I might state that in recent years more and more companies which previously wrote life insurance only at standard rate have entered the sub-standard field, so that today there are very few companies who confine their acceptance to standard risks only.

Q11. State what is the practice of The Columbian National Life Insurance Company in regard to the practices followed by other life insurance companies generally with respect to the underwriting, acceptance, or rejection of applications for policies of life insurance.

A. That is a difficult question to answer except

(Deposition of William L. Sitgreaves.)

in the very broadest terms. Our practices are neither as lenient as the most lenient companies, nor as conservative as the most conservative, as far as general underwriting is concerned. There are naturally some classes of risks on which we are more lenient than the average company, but in general our underwriting practice is about in the middle of the road.

Q12. Did the company follow its usual practice in passing upon the application of Theodore W. Quandt for insurance?

A. Yes; it did.

Q13. I hand you herewith what purports to be the original application for a policy of life insurance on the life of Theodore W. Quandt in the sum of \$15,000, bearing the date in part 1 "November 15, 1943," and in part 2 "November 13, 1943," and bearing the signature of Theodore W. Quandt, and ask you to state whether this document has heretofore been examined by you?

A. It has.

Q14. Will you please hand the document just identified by you to the Notary Public and request that the same be marked Defendant's Exhibit 1 for Identification?

A. I do so.

(Original application of Theodore W. Quandt for life insurance in the sum of \$15,000, part 1 dated November 15, 1943, and part 2 dated November 13, 1943, marked respectively

(Deposition of William L. Sitgreaves.)

Defendant's Exhibit 1A for Identification and
Defendant's Exhibit 1B for Identification.)

Q15. Will you please state when and where you first saw the document which has been previously identified by you and marked by the Notary Public as Defendant's Exhibit 1 for Identification?

A. I first saw the application at some time between Saturday, November 27, 1943, and Tuesday, November 30, 1943, but I am unable to state exactly which date between those extremes. I first saw it in the home office of the Columbian National Life Insurance Company at 77 Franklin Street, Boston.

Q16. What action, if any, was taken by you with respect to the said application?

A. I approved it.

Q17. What action, if any, was taken upon said application by The Columbian National Life Insurance Company, as a result of your action or that of any other official of the company?

A. As the result of the approval by others and myself the Company accepted the risk and issued policy No. 275203 in the amount of \$15,000 payable to A. Quandt & Sons as irrevocable beneficiary.

Q18. Did you, in approving the application herein marked as Defendant's Exhibit 1 for Identification, rely upon the information contained in said application?

A. I did.

Q19. If you had disapproved the application marked herein as Defendant's Exhibit 1 for Identification, would the policy of life insurance num-

(Deposition of William L. Sitgreaves.)

bered 275203 have been issued to Theodore W. Quandt by The Columbian National Life Insurance Company?

A. It would not.

Q20. I direct your attention to the application previously identified by you and marked as Defendant's Exhibit 1 for Identification, and particularly to the questions in part 2 thereof "Personal Statements made by Proposed Insured and Recorded by Medical Examiner," and particularly to the questions thereof numbered 1-a, 7-a, 7-b, and 7-c, 9, 9-c, 9-d, 9-e and 10, and the answers to said questions, and ask you whether or not at the time you approved said application you had any information or knowledge other than that given by the answers to said questions?

A. I did not.

Q21. In approving said application for said policy of life insurance did you consider the answers to questions 1-a, 7-a, 7-b, and 7-c, 9, 9-c, 9-d, 9-e and 10 contained in part 2 of said application material to the risk insured against?

A. Definitely yes.

Q22. If at the time said application was submitted to you you had known that the then present condition of health of Theodore W. Quandt was not good, what action would have been taken by you on said application?

A. I would not have approved the application at that time, and would have investigated to determine the degree of his departure from good health.

(Deposition of William L. Sitgreaves.)

Q23. If at the time said application for said policy of life insurance was approved by you you had known that the said Theodore W. Quandt was then suffering from and had been suffering from a serious illness, what action would have been taken by you?

A. I would not have approved the application at that time, but would have postponed by decision in order that an investigation might be conducted to determine the character, degree, and prognosis of any such illness.

Q24. If at the time said application for insurance was submitted to you you had known that the said Theodore W. Quandt was suffering from a carcinoma of the colon, what action would have been taken by you.

A. I would have declined the risk.

Q25. Please state by what name a carcinoma is generally known to the layman.

A. Cancer.

Q26. If at the time said application was approved by you you had known that said Theodore W. Quandt had consulted a physician on or about March 11, 1943, for a complaint of pains around his heart, what action would have been taken by you on the said application?

A. I would not have approved the application but would have postponed my decision until an investigation could be conducted to determine the underlying pathology and the probable effect upon his longevity of such a medical history.

(Deposition of William L. Sitgreaves.)

Q27. If at the time said application for life insurance was approved by you you had known that said Theodore W. Quandt, commencing with the end of August, 1943, had suffered attacks of nausea which lasted about two days in duration, and which occurred once every six weeks, what action would have been taken by you on said application?

A. The procedure would have been the same as indicated in the answer to the preceding question.

Q28. If at the time said application for said policy of life insurance was approved by you you had known that said Theodore W. Quandt prior to the date of said application and during the month of November had suffered from complaints of the urinary organs in that he was obliged to rise at night to pass urine, what action would have been taken by you on said application?

A. The action I would have taken is similar to that described in the answers to the preceding two questions, with the further doubt as to whether after the supplemental examinations had been completed insurance could have been granted at standard rate in any event, inasmuch as we have come to believe that nocturia occurring in middle life may be the forerunner of serious heart disease.

Q29. Please state the reasons for the answers given by you to the preceding questions.

A. My understanding of this question is that it refers to the answers given to Questions 22 through 28 inclusive. My approval of the application was based upon the assumption that the

(Deposition of William L. Sitgreaves.)

information contained in part 2 of the application was correct as to Mr. Quandt's medical history, and that it indicated that he had experienced no illness or ailment which would adversely affect his longevity. Had any of the conditions described in Questions 22 through 28, inclusive, have been known to me or suspected by me, I would have withheld my approval because any of such conditions would indicate that he had not always been in good health and that possibly his longevity might be affected as a result. Certainly further investigation of any such history would be necessary before I would feel warranted in approving his application for insurance at standard rate. For a condition such as carcinoma of the colon the risk would unquestionably be uninsurable. As for some of the other impairments mentioned in those questions, only further investigation could determine whether the risk was acceptable at all, and if so, on what rate basis.

In Answer to Cross Interrogatories Submitted to
the Notary Public to Be Propounded to the
Witness

XQ1. If your answer to Interrogatory No. 11 is that you follow the practices of the other life insurance companies as well as The Columbian National Life Insurance Company in passing upon applications for life insurance, do those practices require you to reject an application if you knew at the time of passing upon the application that

(Deposition of William L. Sitgreaves.)

Theodore W. Quandt had a common cold on about February 10, 1941?

A. Not for that reason.

XQ2. Do you consider a common cold a bodily disease or infirmity?

A. That is a question of degree. An applicant who is suffering from a common cold at the time of his application is usually postponed until he has recovered from the cold; but once having fully recovered, a history of a common cold would not be considered as an impairment of sufficient importance by itself to warrant unfavorable action on his application.

XQ3. If Theodore W. Quandt had been afflicted with a common cold in February of 1941, and said common cold had passed away within a few days thereafter, would you say that Theodore W. Quandt was not in sound health at the time you passed upon his application for life insurance?

A. He might or might not be in sound health at the later date. I would not say that he was not in sound health merely because he had had such an experience.

XQ4. If at the time you passed upon the application of Theodore W. Quandt for life insurance, Defendant's Exhibit 1 for Identification, said application had disclosed that on February 10, 1941, he had a common cold which passed away within three or four days, would you have rejected the application?

A. Not for that reason.

(Deposition of William L. Sitgreaves.)

XQ5. If said application, part 2, disclosed at the time you passed upon the application that Theodore W. Quandt had been afflicted with a common cold on February 10, 1941, for which his physician had prescribed four physio-therapy treatments, and that said Theodore W. Quandt had completely recovered by February 14, 1941, would you have rejected his application?

A. Again not for that reason.

XQ6. If at the time you passed upon the application as set forth in Defendant's Exhibit 1 for Identification, said application had disclosed that on June 30, 1942, Theodore W. Quandt had complained to his physician that he was tired, and that the examining physician had reported his physical condition as negative, his hemoglobin 80 per cent, would you have considered that Theodore W. Quandt was at that time not in sound health?

A. I would have considered that he was not in sound health in June, 1942; but that would not necessarily mean that he was not in sound health in November of 1943, as he might have been restored to full health in the meantime. On the other hand, he might not have been in sound health in November, 1943, for some other reason.

XQ7. If at the time you passed upon the application as set forth in Defendant's Exhibit 1 for Identification, said application had disclosed that on June 30, 1942, Theodore W. Quandt had complained to his physician that he was tired, and that the examining physician had reported his physical condition as negative, his hemoglobin 80 per

(Deposition of William L. Sitgreaves.)

cent, would you at that time have rejected his application?

A. I would not have rejected his application for that reason, but would have postponed my decision until a further investigation of the history could be made.

XQ8. If the application of Theodore W. Quandt for life insurance in Columbian National Life Insurance Company, Defendant's Exhibit 1 for Identification, had disclosed in addition to the other information that on March 11, 1943, Theodore W. Quandt had visited his physician and had stated that a friend of his died of heart trouble and that he, Theodore W. Quandt, had noticed a few pains around his heart, and that said physician had fluoroscoped his chest, which was negative, and that his hemoglobin was 85 per cent, and that the examination of his heart and lungs were negative, and that no medicine or treatment was prescribed, would you say that at the time you passed upon the application Theodore W. Quandt was not in sound health?

A. With only such information I would not be prepared to say whether he was or was not in sound health. Before determining the significance of such a history I would feel it necessary to withhold any decision and pursue an investigation.

XQ9. If the application of Theodore W. Quandt for life insurance in Columbia National Life Insurance Company, Defendant's Exhibit 1 for Identification, had disclosed in addition to the other in-

(Deposition of William L. Sitgreaves.)

formation that on March 11, 1943, Theodore W. Quandt had visited his physician and had stated that a friend of his died of heart trouble, and that he, Theodore W. Quandt, had noticed a few pains around his heart, and that said physician had fluoroscoped his chest, which was negative, and that his hemoglobin was 85 per cent, and that the examination of his heart and lungs was negative, and that no medicine or treatment was prescribed, would you have approved the application?

A. I would not have approved the application at that time. Instead I would have postponed my decision and would have conducted a further investigation. Moreover, it is doubtful whether the application would ever have been approved for insurance at standard rate if such a history had been known, even though the further investigation proved quite favorable.

XQ10. If the application, part 2 of Defendant's Exhibit 1 for Identification, had in addition to the other information contained therein disclosed that on February 10, 1941, Theodore W. Quandt had a common cold which passed away completely in three days and that on June 30, 1942, said Theodore W. Quandt complained of being tired but that a physical examination was negative and his hemoglobin was 80 per cent, and that on March 11, 1943, said Theodore W. Quandt complained of a few pains around his heart and that a fluoroscope showed that his chest was negative and his hemoglobin 85 per cent, his heart and lungs by examination were nega-

(Deposition of William L. Sitgreaves.)

tive, and no medicine or treatment was prescribed, would you have approved the application?

A. I would not have approved it for insurance at standard rate. Instead I would have postponed a decision and pursued an investigation of the several items in the medical history. In underwriting a risk we consider a combination of two or more impairments or a history of two or more periods of serious illness as decidedly more significant than either impairment or either period of illness standing alone, since experience shows that many such situations are inter-related and may signify a serious impairment of longevity.

XQ11. Do you in passing upon applications for life insurance reject the application for temporary and passing ailments?

A. We temporarily reject them in the sense that we postpone approval of the risk until it can be determined whether the individual has fully recovered, and what effect, if any, the illness has had on his prospect of longevity.

XY12. Do you consider the matters asked in this deposition under cross-interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 bodily disease or infirmity of the applicant?

A. I so consider all of them in the sense that disease is a general term which signifies any departure from good health. Some of the conditions described in these questions are generally considered as only slight departures from good health, while others would be considered much more sig-

(Deposition of William L. Sitgreaves.)

nificant, particularly from the standpoint of an underwriter. In this way it becomes a matter of degree.

XQ13. If at the time you passed upon the application, as set forth in Defendant's Exhibit 1 for Identification, Theodore W. Quandt was suffering from carcinoma of the colon, but Theodore W. Quandt did not know that he was suffering from such ailment, would you in that event have approved the application for life insurance?

A. I would not have approved the application had I known that he was suffering from any such disease, regardless of whether I knew that he was not aware of his condition.

XQ14. If at the time of said application for said policy of life insurance, Defendant's Exhibit 1 for Identification, you had known that said Theodore W. Quandt had after the date of said application consulted a physician and complained of frequency of urine, and that said physician had advised that it was due to nervousness, that a sample of the urine by laboratory tests was completely negative, would you have rejected the application?

A. Instead of rejecting the application outright, I would have withheld a decision, and would have pursued an investigation, including re-examination of Mr. Quandt and re-examination of specimens of his urine, if the other parts of the further investigation proved favorable.

XQ15. Prior to answering the interrogatories

(Deposition of William L. Sitgreaves.)

and cross-interrogatories herein, did anyone tell you or suggest to you what your answers should be?

A. Nobody did.

XQ16. Prior to answering the interrogatories and cross-interrogatories propounded in this case, have you talked with anyone with reference to your answers?

A. Yes, I have.

XQ17. Did you have any consultation or discussion of any kind or character with anyone else whose deposition is being taken in this case with reference to the answers that you would give to said questions?

A. I did not.

XQ18. In passing upon the application for life insurance for Theodore W. Quandt, Defendant's Exhibit 1 for Identification, did you consider the fact that on November 18, 1943, Theodore W. Quandt had consulted his physician complaining of frequency of urine?

A. I did not, because it was unknown to me.

WILLIAM L. SITGREAVES.

RALPH E. PIERCE,

a witness called on behalf of the defendant, having been first duly cautioned and sworn, deposes and says as follows:

In Answer to Direct Interrogatories Submitted to the Notary Public to be Propounded to the Witness.

(Deposition of Ralph E. Pierce.)

Q1. Please state your full name, age, and place of residence.

A. Ralph E. Pierce, 74, 267 Newbury Street, Boston.

Q2. By whom are you employed?

A. The Columbian National Life Insurance Company.

Q3. In what capacity are employed and for how long have you been employed in that capacity?

A. Assistant secretary, 33 years.

Q4. What are your duties in such capacity with The Columbian National Life Insurance Company?

A. I am a member of the Claims Committee, and I also handle various other matters connected with the Company business.

Q5. Please examine the document attached to these interrogatories and previously identified by Dr. Hugh Crawford as Defendant's Exhibit 1. Please state if you have ever seen this document before.

A. Yes.

Q6. If your answer to the preceding interrogatory is in the affirmative, will you please state the date upon which you first saw this document?

A. To the best of my recollection, I saw it immediately after the insured's death had been reported.

Q7. What, if any, events occurred which caused you to refer to this document which has been previously identified and marked Defendant's Exhibit 1 for Identification herein?

(Deposition of Ralph E. Pierce.)

A. The report of the insured's death.

Q8. Will you please state the circumstances surrounding your examination of the document previously identified and marked Defendant's Exhibit 1 for Identification herein?

A. The insured's death had been reported, and I was considering what action the Company should take.

Q9. As a member of the Claims Committee of The Columbian National Life Insurance Company what are your duties in connection with that committee?

A. To examine proofs submitted in connection with claims under policies, and to pass upon the claims, either approving or rejecting them.

Q10. Did you during the year 1944 receive a claim for or proofs of death under a policy of insurance numbered 275203, issued upon the life of Theodore W. Quandt?

A. Yes.

Q11. If your answer to the preceding interrogatory is in the affirmative, will you please state the dates upon which you received said claims or proofs of death?

A. April 14, 1944.

Q12. What, if any, action was taken by you upon receipt of said claims or proofs of death?

A. In conjunction with other members of the Claims Committee I caused the institution of an investigation regarding the circumstances of the death and the past history of the insured.

(Deposition of Ralph E. Pierce.)

Q13. Prior to the receipt of said claims or proofs of death did you or any other person connected with The Columbian National Life Insurance Company have any knowledge whatsoever that Theodore W. Quandt had ever suffered from a serious illness?

A. I did not have any such knowledge, and none of the Company files give any indication of such knowledge. No one connected with the Company has ever indicated to me any such knowledge.

Q14. Prior to the receipt by you of said claims or proofs of death did you or any other person connected with The Columbian National Life Insurance Company have any knowledge that the said Theodore W. Quandt had ever consulted a physician during the three years next preceding the date of his application for insurance other than is stated in said application?

A. The answer is the same as the answer to Question 13.

Q15. Prior to the receipt by you of claims or proofs of death, or by any other person connected with The Columbian National Life Insurance Company, did you have any knowledge that the said Theodore W. Quandt had ever suffered from and consulted a physician for pains located around and involving his heart on or about March 11, 1943?

A. The answer is the same as the answer to Question 13.

Q16. Prior to the receipt by you of said claims or proofs of death did you or any other person

(Deposition of Ralph E. Pierce.)

connected with The Columbian National Life Insurance Company have any knowledge that said Theodore W. Quandt has suffered from attacks of nausea beginning at the end of August, 1943?

A. The answer is the same as the answer to Question 13.

Q17. Prior to the receipt by you of said claims or proofs of death did you or any other person connected with said company have any knowledge that the said Theodore W. Quandt in November of 1943 had suffered from complaints of the urinary organs, in that he had suffered from the necessity of rising at night to pass urine?

A. The answer is the same as the answer to Question 13.

Q18. When, if ever, did you or any other person connected with the Company first learn of the facts referred to in the preceding questions?

A. Shortly after the death of the insured.

Q19. Did you or any other person connected with the Company have any knowledge that said Theodore W. Quandt at any time was suffering from a carcinoma of the colon?

A. I have not been able to discover that anyone connected with the Company had any such knowledge prior to the death of the insured.

Q20. When did you or any other person connected with the Company have any knowledge that the answers to the questions contained in part 2 of the application for insurance made by said Theo-

(Deposition of Ralph E. Pierce.)

dore W. Quandt numbered 1-a, 7-a, 7-b, 7-c, 9, 9-c, 9-d, 9-e, and 10 therein were false and untrue?

A. Shortly after the death of the insured.

Q21. Did you refer to the answers contained in the application for insurance herein previously identified when you received the claims or proofs of death submitted by A. Quandt & Sons?

A. Yes.

Q22. What if any action was taken by you when the claims or proofs of death were submitted on the policy of insurance numbered 275203?

A. We instituted an investigation, as I have already stated.

Q23. If your answer to the preceding interrogatory is that you caused an investigation to be carried on surrounding the death of the insured, Theodore W. Quandt, will you please state when you received the information which resulted from said investigation?

A. We received most of it in April, 1944, or shortly thereafter.

Q25. Was the information received from said investigation the first knowledge that you or The Columbian National Life Insurance Company had that the representations contained in the application for the policy of insurance sued upon herein and previously identified, and particularly the answers to questions therein contained, were false and untrue?

(No cross interrogatories.)

RALPH E. PIERCE

HENRY A. PLIMPTON,

a witness called on behalf of the defendant, having been first duly cautioned and sworn, deposes and says as follows:

In Answer to Direct Interrogatories Submitted to the Notary Public to be Propounded to the Witness

Q1. Please state your full name, age and place of residence.

A. Henry A. Plimpton; 42, 35 Gammons Road, Waban, Massachusetts.

Q2. What is your occupation or profession?

A. Actuary.

Q3. If you are a physician, please state of what school of medicine you are a graduate, the time of your graduation, and outline briefly your professional activity since the time of your graduation.

A. I am not a physician.

Q4. By whom are you employed?

A. The Columbian National Life Insurance Company.

Q5. In what capacity are you employed, and for how long have you been employed in that capacity?

A. Actuary, seven years.

Q6. Please state the nature of your duties in the capacities in which you are employed.

A. The usual duties of an actuary, including some underwriting.

Q7. Who in The Columbian National Life In-

(Deposition of Henry A. Plimpton.)

insurance Company has the duty of final approval or disapproval of applications to said company for life insurance?

A. One or more of the three members of the underwriting committee, depending upon the amount of insurance.

Q8. What has been your general training and experience in this line of work, and particularly in connection with the underwriting, acceptance or rejection of life insurance risks?

A. Actuarial training and work for 19 years with particular attention to underwriting during the last seven years.

Q9. What has been your general experience with regard to the usual practice of life insurance companies as to the underwriting, acceptance and rejection of life insurance risks pertaining to policies of life insurance?

A. General discussions with other actuaries and underwriters at various meetings over the last twelve years.

Q10. If you are familiar with it, please state what is the practice of life insurance companies generally with respect to the underwriting, acceptance, and rejection of life insurance risks.

A. The companies try to select such risks as will give a satisfactory mortality, and reject those risks which experience has proven provide increased mortality.

Q11. State what is the practice of The Columbian National Life Insurance Company in regard

(Deposition of Henry A. Plimpton.)

to the practices followed by other life insurance companies generally with respect to the underwriting, acceptance, or rejection of applications for policies of life insurance.

A. The practice of The Columbian is in line with the average of most companies, being neither too strict nor too lenient.

Q12. Did the company follow its usual practice in passing upon the application of Theodore W. Quandt for insurance?

A. Yes.

Q13. I hand you herewith what purports to be the original application for a policy of life insurance on the life of Theodore W. Quandt in the sum of \$15,000, bearing the date in part 1 "November 15, 1943", and in part 2 "November 13, 1943," and bearing the signature of Theodore W. Quandt, and ask you to state whether this document has heretofore been examined by you.

A. Yes.

Q14. Will you please hand the document just identified by you to the Notary Public and request that the same be marked Defendant's Exhibit 1 for Identification?

A. That has already been done.

Q15. Will you please state when and where you first saw the document which has been previously identified by you and marked by the Notary Public as Defendant's Exhibit 1 for Identification?

A. November 30, 1943; in my office.

(Deposition of Henry A. Plimpton.)

Q16. What action, if any, was taken by you with respect to the said application?

A. The application was approved.

Q17. What action, if any, was taken upon said application by The Columbian National Life Insurance Company, as a result of your action or that of any other official of the company?

A. The application was accepted and policy issued.

Q18. Did you, in approving the application herein marked as Defendant's Exhibit 1 for Identification, rely upon the information contained in said application?

A. Yes.

Q19. If you had disapproved the application marked herein as Defendant's Exhibit 1 for Identification, would the policy of life insurance numbered 275203 have been issued to Theodore W. Quandt by The Columbian National Life Insurance Company?

A. No.

Q20. I direct your attention to the application previously identified by you and marked as Defendant's Exhibit 1 for Identification, and particularly to the questions in part 2 thereof "Personal Statements made by Proposed Insured and Recorded by Medical Examiner", and particularly to the questions thereof numbered 1-a, 7-a, 7-b, 7-c, 9, 9-c, 9-d, 9-e and 10, and the answers to said questions, and ask you whether or not at the time you approved said application you had any informa-

(Deposition of Henry A. Plimpton.)

tion or knowledge other than that given by the answers to said questions?

A. No.

Q21. In approving said application for said policy of life insurance did you consider the answers to questions 1-a, 7-a, 7-b, and 7-c, 9, 9-c, 9-d, 9-e and 10 contained in part 2 of said application material to the risk insured against?

A. Yes.

Q22. If at the time said application was submitted to you you had known that the then present condition of health of Theodore W. Quandt was not good, what action would have been taken by you on said application?

A. I would have asked for further information.

Q23. If at the time said application for said policy of life insurance was approved by you you had known that the said Theodore W. Quandt was then suffering from and had been suffering from a serious illness, what action would have been taken by you?

A. I would have disapproved the application.

Q24. If at the time said application for insurance was submitted to you you had known that the said Theodore W. Quandt was suffering from a carcinoma of the colon, what action would have been taken by you?

A. I would have disapproved the application.

Q25. Please state by what name a carcinoma is generally known to the layman.

A. Cancer.

(Deposition of Henry A. Plimpton.)

Q26. If at the time said application was approved by you you had known that said Theodore W. Quandt had consulted a physician on or about March 11, 1943, for a complaint of pains around his heart, what action would have been taken by you on the said application?

A. I would have withheld approval pending receipt of further information.

Q27. If at the time said application for life insurance was approved by you you had known that said Theodore W. Quandt, commencing with the end of August, 1943, had suffered attacks of nausea which lasted about two days in duration, and which occurred once every six weeks, what action would have been taken by you on said application?

A. I would have withheld approval pending receipt of further information.

Q28. If at the time said application for said policy of life insurance was approved by you you had known that said Theodore W. Quandt prior to the date of said application and during the month of November had suffered from complaints of the urinary organs in that he was obliged to rise at night to pass urine, what action would have been taken by you on said application?

A. I would have withheld approval pending receipt of further information.

Q29. Please state the reasons for the answers given by you to the preceding questions.

A. The symptoms described indicate that the

(Deposition of Henry A. Plimpton.)

applicant might have had some condition tending to increase the risk.

In Answer to Cross Interrogatories Submitted to
the Notary Public to be Propounded to the
Witness

XQ1. If your answer to Interrogatory No. 11 is that you follow the practices of the other life insurance companies as well as The Columbian National Life Insurance Company in passing upon applications for life insurance, do those practices require you to reject an application if you knew at the time of passing upon the application that Theodore W. Quandt had a common cold on or about February 10, 1941?

A. No.

XQ2. Do you consider a common cold a bodily disease or infirmity?

A. Yes, but not serious.

XQ3. If Theodore W. Quandt had been afflicted with a common cold in February of 1941, and said common cold had passed away within a few days thereafter, would you say that Theodore W. Quandt was not in sound health at the time you passed upon his application for life insurance?

A. No. A common cold some time in the past would have no bearing upon his present condition.

XQ4. If at the time you passed upon the application of Theodore W. Quandt for life insurance, Defendant's Exhibit 1 for Identification, said application had disclosed that on February 10, 1941, he had a common cold which passed away within

(Deposition of Henry A. Plimpton.)

three or four days, would you have rejected the application?

A. Not for that reason.

XQ5. If said application, part 2, disclosed at the time you passed upon the application that Theodore W. Quandt had been afflicted with a common cold on February 10, 1941, for which his physician had prescribed four physio-therapy treatments, and that said Theodore W. Quandt had completely recovered by February 14, 1941, would you have rejected his application?

A. No, but we would have asked for information from the attending physician.

XQ6. If at the time you passed upon the application as set forth in Defendant's Exhibit 1 for Identification, said application had disclosed that on June 30, 1942, Theodore W. Quandt had complained to his physician that he was tired, and that the examining physician had reported his physical condition as negative, his hemoglobin 80 per cent, would you have considered that Theodore W. Quandt was at that time not in sound health?

A. Again I would have wanted further information.

XQ7. If at the time you passed upon the application as set forth in Defendant's Exhibit 1 for Identification, said application had disclosed that on June 30, 1942, Theodore W. Quandt had complained to his physician that he was tired, and that the examining physician had reported his physical condition as negative, his hemoglobin 80 per cent,

(Deposition of Henry A. Plimpton.)

would you at that time have rejected his application?

A. I would have withheld approval pending receipt of further information.

XQ8. If the application of Theodore W. Quandt for life insurance in Columbian National Life Insurance Company, Defendant's Exhibit 1 for Identification, had disclosed in addition to the other information that on March 11, 1943, Theodore W. Quandt had visited his physician and had stated that a friend of his died of heart trouble and that he, Theodore W. Quandt, had noticed a few pains around his heart, and that said physician had fluoroscoped his chest, which was negative, and that his hemoglobin was 85 per cent, and that the examination of his heart and lungs were negative, and that no medicine or treatment was prescribed, would you say that at the time you passed upon the application Theodore W. Quandt was not in sound health?

A. I would have needed further information.

XQ9. If the application of Theodore W. Quandt for life insurance in Columbian National Life Insurance Company, Defendant's Exhibit 1 for Identification, had disclosed in addition to the other information that on March 11, 1943, Theodore W. Quandt had visited his physician and had stated that a friend of his died of heart trouble and that he, Theodore W. Quandt, had noticed a few pains around his heart, and that said physician had fluoroscoped his chest, which was negative, and that

(Deposition of Henry A. Plimpton.)

his hemoglobin was 85 per cent, and that the examination of his heart and lungs was negative, and that no medicine or treatment was prescribed, would you have approved the application?

A. I would have withheld approval pending further information.

XQ10. If the application, part 2 of Defendant's Exhibit 1 for Identification, had in addition to the other information contained therein disclosed that on February 10, 1941, Theodore W. Quandt had a common cold which passed away completely in three days and that on June 30, 1942, said Theodore W. Quandt complained of being tired but that a physical examination was negative and his hemoglobin was 80 per cent, and that on March 11, 1943, said Theodore W. Quandt complained of a few pains around his heart and that a fluoroscope showed that his chest was negative and his hemoglobin 85 per cent, his heart and lungs by examination were negative, and no medicine or treatment was prescribed, would you have approved the application?

A. I would have withheld approval pending further information.

XQ11. Do you in passing upon applications for life insurance reject the application for temporary and passing ailments?

A. My action would depend upon the nature of the ailment and the possible indication of a permanent impairment.

XQ12. Do you consider the matters asked in

(Deposition of Henry A. Plimpton.)

this deposition under cross interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, bodily disease or infirmity of the applicant?

A. With the exception of the common cold, they indicate that the applicant might not be in sound health.

XQ13. If at the time you passed upon the application, as set forth in Defendant's Exhibit 1 for Identification, Theodore W. Quandt was suffering from carcinoma of the colon, but Theodore W. Quandt did not know that he was suffering from such ailment, would you in that event have approved the application for life insurance?

A. No.

XQ14. If at the time of said application for said policy of life insurance, Defendant's Exhibit 1 for Identification, you had known that said Theodore W. Quandt had after the date of said application consulted a physician and complained of frequency of urine, and that said physician had advised that it was due to nervousness, that a sample of the urine by laboratory tests was completely negative, would you have rejected the application?

A. I would have withheld approval pending further information.

XQ15. Prior to answering the interrogatories and cross interrogatories herein, did anyone tell you or suggest to you what your answers should be?

A. No.

XQ16. Prior to answering the interrogatories and cross interrogatories propounded in this case,

(Deposition of Henry A. Plimpton.)

have you talked with anyone with reference to your answers? A. No.

XQ17. Did you have any consultation or discussion of any kind or character with anyone else whose deposition is being taken in this case with reference to the answers that you would give to said questions? A. No.

XQ18. In passing upon the application for life insurance for Theodore W. Quandt, Defendant's Exhibit 1 for Identification, did you consider the fact that on November 18, 1943, Theodore W. Quandt had consulted his physician complaining of frequency of urine? A. No.

HENRY A. PLIMPTON

Examining Room, Home Office, The Columbian
National Life Insurance Company, 77 Franklin
Street, Boston, Mass., Thursday, November 16,
1944, 11:30 a. m.

HUGH W. CRAWFORD,

a witness called on behalf of the defendant, having
been first duly cautioned and sworn, deposes and
says as follows:

In Answer to Direct Interrogatories Submitted to
the Notary Public to be Propounded to the
Witness

Q1. Please state your full name, age and place
of residence.

(Deposition of Hugh W. Crawford.)

A. My name is Hugh W. Crawford. I am 40 years of age. I reside at 17 Oakland Street, Wellesley Hills, Massachusetts.

Q2. What is your occupation or profession?

A. I am a physician employed by The Columbian National Life Insurance Company, 77 Franklin Street, Boston, as its medical director.

Q3. If you are a physician, please state of what school of medicine you are a graduate, the time of your graduation, and outline briefly your professional activity since the time of your graduation.

A. I was graduated from the University of Toronto, Toronto, Canada, in 1928. For the next year I was an interne at the Toronto General Hospital, doing general surgical and medical work. In October, 1929, I was appointed to the staff of the medical department of the Connecticut General Life Insurance Company, one of the large life insurance companies in Hartford. In 1935 I resigned from this position to become medical director of The Columbian National Life Insurance Company at Boston. During this period I also became a member of the Association of Life Insurance Medical Directors and a member of the medical section of the American Life Convention. Prior to the war these societies met annually to discuss matters pertaining to the selection of risks.

Q4. By whom are you employed?

A. I am employed by The Columbian National Life Insurance Company, Boston, Massachusetts.

(Deposition of Hugh W. Crawford.)

Q5. In what capacity are you employed, and for how long have you been employed in that capacity?

A. I have been employed in the capacity of medical director by The Columbian National Life Insurance Company for nine years.

Q6. Please state the nature of your duties in the capacities in which you are employed.

A. My duties consist of appointing medical examiners in our many branch offices. These medical examiners examine the applicants for insurance. In addition I pass on applications for life insurance, act on claims, and supervise the health of the employees of The Columbian National Life Insurance Company at the Home Office.

Q7. Who in The Columbian National Life Insurance Company has the duty of final approval or disapproval of applications to said company for life insurance?

A. The president or his representative Mr. Plimpton, the chief underwriter Mr. Sitgreaves, and myself.

Q8. What has been your general training and experience in this line of work, and particularly in connection with the underwriting, acceptance or rejection of life insurance risks?

A. I have been especially trained for this particular kind of work, and have had fifteen years of experience in selecting risks. In 1929 I began my work by examining applicants for life insurance at the Home Office of the Connecticut General Life Insurance Company. I also supervised the

(Deposition of Hugh W. Crawford.)

laboratory at that office. At the same time I began acting on small applications for life insurance, and as my experience grew, I passed on applications for large amounts of life insurance. Furthermore, I have had experience in selecting risks for accident and health insurance and for re-insurance. My work at the Columbian has been a continuation of this work.

Q9. What has been your general experience with regard to the usual practice of life insurance companies as to the underwriting, acceptance and rejection of life insurance risks pertaining to policies of life insurance?

A. In general I am familiar with their practices.

Q10. If you are familiar with it, please state what is the practice of life insurance companies generally with respect to the underwriting, acceptance, and rejection of life insurance risks.

A. Companies vary in their underwriting practice. Some companies are liberal. Some companies are strict. Some companies issue insurance to only first-class risks. Others issue risks to impaired risks, but charge an extra premium for the risk they assume.

Q11. State what is the practice of The Columbian National Life Insurance Company in regard to the practices followed by other life insurance companies generally with respect to the underwriting, acceptance, or rejection of applications for policies of life insurance.

(Deposition of Hugh W. Crawford.)

A. The Columbian tries not to be too liberal nor too strict. In general we follow a middle-of-the-road policy.

Q12. Did the company follow its usual practice in passing upon the application of Theodore W. Quandt for insurance? A. Yes.

Q13. I hand you herewith what purports to be the original application for a policy of life insurance on the life of Theodore W. Quandt in the sum of \$15,000, bearing the date in part 1 "November 15, 1943," and in part 2 "November 13, 1943," and bearing the signature of Theodore W. Quandt, and ask you to state whether this document has heretofore been examined by you.

A. Yes; it has heretofore been examined by me.

Q14. Will you please hand the document just identified by you to the Notary Public and request that the same be marked Defendant's Exhibit 1 for Identification?

A. That has already been done by another witness.

Q15. Will you please state when and where you first saw the document which has previously been identified by you and marked by the Notary Public as Defendant's Exhibit 1 for Identification?

A. I first saw this document at the Home Office of The Columbian National Life Insurance Company in Boston on November 27th, 1943.

Q16. What action, if any, was taken by you with respect to the said application?

A. I approved the application at standard rates.

(Deposition of Hugh W. Crawford.)

Q17. What action, if any, was taken upon said application by The Columbian National Life Insurance Company, as a result of your action or that of any other official of the Company?

A. The Columbian National Life Insurance Company approved the application at standard rates after it had been approved by Mr. Sitgreaves, Mr. Plimpton, and myself.

Q18. Did you, in approving the application herein marked as Defendant's Exhibit 1 for Identification, rely upon information contained in said application? A. Yes.

Q19. If you had disapproved the application marked herein as Defendant's Exhibit 1 for Identification, would the policy of life insurance numbered 275203 have been issued to Theodore W. Quandt by The Columbian National Life Insurance Company?

A. The policy would not have been issued.

Q20. I direct your attention to the application previously identified by you and marked as Defendant's Exhibit 1 for Identification, and particularly to the questions in part 2 thereof "Personal Statements made by Proposed Insured and Recorded by Medical Examiner", and particularly to the questions thereof numbered 1-a, 7-a, 7-b, and 7-c, 9, 9-c, 9-d, 9-e, and 10, and the answers to said questions, and ask you whether or not at the time you approved said application you had any information or knowledge other than that given by the answers to said questions?

(Deposition of Hugh W. Crawford.)

A. By "other information" I presume you mean different. I had none. I did, however, have a statement from Mr. Quandt's attending physician, Dr. Mitchell, dated November 18, 1943, which read as follows:

"Applicant has been examined several times in past 3-4 years and is in excellent physical condition."

However, I would not have accepted this statement at its face value if I had learned during our investigation that Mr. Quandt had suffered from pains around the heart, was obliged to get up at night to pass his urine, and had complained of being tired. I would have written to Dr. Mitchell asking him for complete details about these matters.

Q21. In approving said application for said policy of life insurance did you consider the answers to questions 1-a, 7-a, 7-b, and 7-c, 9, 9-c, 9-d, 9-e and 10 contained in part 2 of said application material to the risk insured against? A. Yes.

Q22. If at the time said application was submitted to you you had known that the then present condition of health of Theodore W. Quandt was not good, what action would have been taken by you on said application?

A. I would not have approved the application.

Q23. If at the time said application for said policy of life insurance was approved by you you had known that the said Theodore W. Quandt was then suffering from and had been suffering from a

(Deposition of Hugh W. Crawford.)

serious illness, what action would have been taken by you?

A. I would have declined his application.

Q24. If at the time said application for insurance was submitted to you you had known that the said Theodore W. Quandt was suffering from a carcinoma of the colon, what action would have been taken by you?

A. I would have rejected his application.

Q25. Please state by what name a carcinoma is generally known to the layman. A. Cancer.

Q26. If at the time said application was approved by you you had known that said Theodore W. Quandt had consulted a physician on or about March 11, 1943, for a complaint of pains around his heart, what action would have been taken by you on the said application?

A. I would not have approved his application. Instead I would have written to the attending physician to determine the probable cause of the pain around his heart. Depending on his reply, I would then have decided whether or not an additional investigation, which would have included an examination by a cardiologist, an x-ray, and an electrocardiogram, would have been necessary. From my experience I know that pains around the heart are often suggestive of heart disease, especially when the applicant is over 50 years of age and when he applies for a substantial amount of insurance. I would have conducted a very thorough

(Deposition of Hugh W. Crawford.)

investigation to satisfy myself about the nature of the pains around his heart.

Q27. If at the time said application for life insurance was approved by you you had known that said Theodore W. Quandt, commencing with the end of August, 1943, had suffered attacks of nausea which lasted about two days in duration, and which occurred once every six weeks, what action would have been taken by you on said application?

A. I would not have approved his application at standard rates.

Q28. If at the time said application for said policy of life insurance was approved by you you had known that said Theodore W. Quandt prior to the date of said application and during the month of November had suffered from complaints of the urinary organs in that he was obliged to rise at night to pass urine, what action would have been taken by you on said application?

A. I would have conducted an investigation to determine why it was necessary for Mr. Quandt to rise at night to pass his urine. It is not normal for a man to rise at night to pass his urine unless he has taken a large amount of fluid before retiring, and consequently I would have considered him a poor risk. During the past three or four years I have had to consider this matter of an applicant rising at night to pass his urine on other applications. I have discussed it with various medical men, one especially who is an assistant professor at one

(Deposition of Hugh W. Crawford.)

of our medical colleges. This colleague tells me he is convinced that many of these applicants suffer from heart trouble. Realizing then that because Mr. Quandt was rising to pass his urine he might have been suffering from heart trouble, I would also have requested an electrocardiogram.

Q29. Please state the reasons for the answers given by you to the preceding questions.

A. I believe my reasons have been covered in the preceding questions. Suffice it to say I have had a long experience in dealing with applicants and their various disorders. I know that we cannot disregard conditions which may be a sign of deep-seated disease.

In Answer to Cross-Interrogatories Submitted to
the Notary Public to Be Propounded to the
Witness

XQ1. If your answer to Interrogatory No. 11 is that you follow the practices of the other life insurance companies as well as The Columbian National Life Insurance Company, in passing upon the applications for life insurance, do those practices require you to reject an application if you knew at the time of passing upon application that Theodore W. Quandt had a common cold on about February 10, 1941?

A. The practices of other companies and of The Columbian do not make it necessary for us to reject an application for life insurance because the applicant has suffered from a common cold from

(Deposition of Hugh W. Crawford.)

which he has recovered some months prior to the date of his application for insurance. We would therefore not have rejected Mr. Quandt's application for insurance simply because he had a common cold on that date from which he recovered in a few days.

XQ2. Do you consider a common cold a bodily disease or infirmity?

A. I consider it a bodily disease.

XQ3. If Theodore W. Quandt had been afflicted with a common cold in February of 1941, and said common cold had passed away within a few days thereafter, would you say that Theodore W. Quandt was not in sound health at the time you passed upon his application for life insurance?

A. I would say that the common cold in February, 1941, had no bearing on his state of health in November, 1943. His physical condition could become worse during that period of time.

XQ4. If at the time you passed upon the application of Theodore W. Quandt for life insurance, Defendant's Exhibit 1 for Identification, said application had disclosed that on February 10, 1941, he had a common cold which passed away within three or four days, would you have rejected the application?

A. I would not have rejected the application.

XQ5. If said application, part 2, disclosed at the time you passed upon the application that Theodore W. Quandt had been afflicted with a common cold on February 10, 1941, for which his

(Deposition of Hugh W. Crawford.)

physician had prescribed four physio-therapy treatments, and that said Theodore W. Quandt had completely recovered by February 14, 1941, would you have rejected his application?

A. I would not have rejected his application because of a common cold.

XQ6. If at the time you passed upon the application as set forth in Defendant's Exhibit 1 for Identification, said application had disclosed that on June 30, 1942, Theodore W. Quandt had complained to his physician that he was tired, and that the examining physician had reported his physical condition as negative, his hemoglobin 80 per cent, would you have considered that Theodore W. Quandt was at that time not in sound health?

A. If you mean by examining physician our medical examiner in San Francisco, I would probably have regarded Mr. Quandt as being in sound health when I was asked to pass on his application; but if you mean that the examining physician was his own attending physician, I would not have considered him in sound health but would have conducted an investigation with a view to learning the cause of his fatigue, and whether or not he had recovered from his feeling of tiredness. Furthermore, I would want to know if his hemoglobin had remained stationary, had improved, or had got worse. Moreover, I would like to know if he showed any evidence of anemia.

XQ7. If at the time you passed upon the application as set forth in Defendant's Exhibit 1 for

(Deposition of Hugh W. Crawford.)

Identification, said application had disclosed that on June 30, 1942, Theodore W. Quandt had complained to his physician that he was tired, and that the examining physician had reported his physical condition as negative, his hemoglobin 80 per cent, would you at that time have rejected his application?

A. If you mean by examining physician our medical examiner in San Francisco, I believe I might have approved the application either at standard or sub-standard rates. If you mean his attending physician, then I would have conducted a further investigation, because a hemoglobin of 80 per cent of normal—that is, four-fifths of normal—might be an indication that he was suffering from a beginning anemia, and that his feeling of fatigue was due to this. Furthermore, a hemoglobin as low as 80 per cent might be a warning that he was suffering from some deep-seated condition which was causing a beginning anemia and a feeling of fatigue. I would therefore want to know whether or not he had recovered from his feeling of fatigue and whether his hemoglobin had returned to normal. Moreover, as there are different ways of determining the hemoglobin of the blood, I would want to know what method was used. In this instance, I would not have rejected his application because I was conducting an investigation.

XQ8. If the application of Theodore W. Quandt for life insurance in Columbian National Life Insurance Company, Defendant's Exhibit 1 for Identi-

(Deposition of Hugh W. Crawford.)

fication, had disclosed in addition to the other information that on March 11, 1943, Theodore W. Quandt had visited his physician and had stated that a friend of his died of heart trouble and that he, Theodore W. Quandt, had noticed a few pains around his heart, and that said physician had fluoroscoped his chest, which was negative, and that his hemoglobin was 85 per cent, and that the examination of his heart and lungs were negative, and that no medicine or treatment was prescribed, would you say that at the time you passed upon the application Theodore W. Quandt was not in sound health?

A. I would be suspicious that he was not in sound health, because there is no mention made of an electrocardiogram. From experience I know we cannot overlook the pains around the heart as a cause of heart disease in men over 50 years of age, and I believe an electrocardiogram absolutely necessary in these cases.

XQ9. If the application of Theodore W. Quandt for life insurance in Columbian National Life Insurance Company, Defendant's Exhibit 1 for Identification, had disclosed in addition to the other information that on March 11, 1943, Theodore W. Quandt had visited his physician and had stated that a friend of his died of heart trouble, and that he, Theodore W. Quandt, had noticed a few pains around his heart, and that said physician had fluoroscoped his chest, which was negative, and that his hemoglobin was 85 per cent, and that the exami-

(Deposition of Hugh W. Crawford.)

nation of his heart and lungs was negative, and that no medicine or treatment was prescribed, would you have approved the application?

A. We would not have approved the application. Instead we would have requested a special examination of Mr. Quandt by a cardiologist, who would not only x-ray his heart but would also take an electrocardiogram.

XQ10. If the application, part 2 of Defendant's Exhibit 1 for Identification, had in addition to the other information contained therein disclosed that on February 10, 1941, Theodore W. Quandt had a common cold which passed away completely in three days and that on June 30, 1942, said Theodore W. Quandt complained of being tired but that a physical examination was negative and his hemoglobin was 80 per cent, and that on March 11, 1943, said Theodore W. Quandt complained of a few pains around his heart and that a fluoroscope showed that his chest was negative and his hemoglobin 85 per cent, his heart and lungs by examination were negative and no medicine or treatment was prescribed, would you have approved the application?

A. I would not have approved the application. I would have requested a special examination by a heart specialist in San Francisco, and I would have instructed him not only to obtain full details concerning the severity, location, and nature of the pains, but I would also have asked him to be sure to x-ray Mr. Quandt's heart and take an electrocardiogram.

(Deposition of Hugh W. Crawford.)

XQ11. Do you in passing upon applications for life insurance reject the application for temporary and passing ailments?

A. I do not reject an application for life insurance for temporary and passing ailments provided the ailments are temporary, have passed, and are not indicative of deep-seated disease.

XQ12. Do you consider the matters asked in this deposition under cross-interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 bodily disease or infirmity of the applicant?

A. I regard the common cold as a bodily disease. I regard the feeling of fatigue, the hemoglobin of 80 per cent, and the history of pains around the heart not as bodily diseases or infirmities themselves but signs and symptoms of bodily disease.

XQ13. If at the time you passed upon the application as set forth in Defendant's Exhibit 1 for Identification, Theodore W. Quandt was suffering from carcinoma of the colon, but Theodore W. Quandt did not know that he was suffering from such ailment, would you in that event have approved the application for life insurance?

A. We would not have approved the application. We would have rejected it.

XQ14. If at the time of said application for said policy of life insurance, Defendant's Exhibit 1 for Identification, you had known that said Theodore W. Quandt had after the date of said application consulted a physician and complained of frequency of urine, and that said physician had advised that

(Deposition of Hugh W. Crawford.)

it was due to nervousness, that a sample of the urine by laboratory tests was completely negative, would you have rejected the application?

A. There again I would not have approved the application knowing that Mr. Quandt had suffered from frequency of urine. I would have conducted an investigation with a view to learning what our examiner, not the attending physician, thought was the cause of the frequency, and I would be guided by his opinion. Furthermore, I would ask him to learn why Mr. Quandt was nervous, and if his nervousness was caused by some disease such as a goiter. There are many causes for frequency of the urine, such as diabetes, kidney trouble, and circulatory disease. So it would be necessary for us to satisfy ourselves as to the cause of the frequency. Under the circumstances I would not have rejected the application while I was conducting the investigation.

XQ15. Prior to answering the interrogatories and cross-interrogatories herein, did anyone tell you or suggest to you what your answers should be?

A. No.

XQ16. Prior to answering the interrogatories and cross-interrogatories propounded in this case, have you talked with anyone with reference to your answers?

A. Yes.

XQ17. Did you have any consultation or discussion of any kind or character with any one else whose deposition is being taken in this case with

(Deposition of Hugh W. Crawford.)

reference to the answers that you would give to said questions?

A. No; except that before the interrogatories were prepared I did have a discussion of a general nature.

XQ18. In passing upon the application for life insurance for Theodore W. Quandt, Defendant's Exhibit 1 for Identification, did you consider the fact that on November 18, 1943, Theodore W. Quandt had consulted his physician complaining of frequency of urine?

A. I did not know that Mr. Quandt had consulted his physician on November 18, 1943, because of frequency of urination.

HUGH W. CRAWFORD.

Commonwealth of Massachusetts

November 27, 1944

Suffolk—ss.

I, Emilie Burford Murray, Notary Public before whom the foregoing depositions were taken on behalf of the defendant on November 15 and 16, 1944, hereby certify that the witness William L. Sitgreaves, upon reading his deposition and before signing it, made the following statement:

“Inasmuch as the original application, which has been marked Defendant's Exhibits 1-A and 1-B for Identification, is part of the Company's official records, I request that the photostatic copies which I

hand you at this time be substituted for the original application, and state that they are true copies of the two parts of the application.”

I further certify that the witness Henry A. Plimpton, upon reading his deposition and before signing it, made the following statement:

“On reading cross-interrogatory No. 16, I think I misunderstood this question, and therefore request that the answer be changed to ‘Yes.’”

In Testimony Whereof I hereunto set my hand and affix my seal of office at Boston in said Commonwealth of Massachusetts this 27th day of November, 1944.

[Seal] EMILIE BURFORD MURRAY,
Notary Public.

Commonwealth of Massachusetts

November, 1944

Suffolk—ss.

I, Emilie Burford Murray, a Notary Public within and for the Commonwealth of Massachusetts, do hereby certify that the foregoing depositions of Hugh W. Crawford, William L. Sitgreaves, Henry A. Plimpton, and Ralph E. Pierce were taken on behalf of the defendant in the case of A. Quandt & Sons, plaintiff, v. The Columbian National Life Insurance Company, defendant, No. 23581-G on the docket of the District Court of the United States for the Northern District of California, Southern Division, pursuant to stipulation of counsel, which is hereto annexed, and upon written interrogatories

submitted by counsel for the plaintiff and counsel for the defendant, before me, in the Offices of The Columbian National Life Insurance Company, 77 Franklin Street, Boston, Massachusetts, on Wednesday, November 15, 1944, and Thursday, November 16, 1944; that each of said witnesses was by me duly cautioned and sworn before the commencement of his testimony; that the testimony of said witnesses was taken stenographically by me and subsequently transcribed under my direction; that neither the plaintiff nor the defendant was represented in the taking of said depositions; that each of said witnesses subsequently read and signed his deposition; that photostatic copies of the document marked Defendant's Exhibit 1-A for Identification and Defendant's Exhibit 1-B for Identification are hereto attached; and that I am not connected by blood or marriage with any of the parties to the above entitled action, nor interested directly or indirectly in the matter in controversy.

In Testimony Whereof I hereunto set my hand and affix my seal of office at Boston in said Commonwealth of Massachusetts this 27th day of November, 1944.

[Seal]

EMILIE BURFORD MURRAY,
Notary Public.

[Endorsed]: Filed Nov. 30, 1944.

[Endorsed]: No. 11152. United States Circuit Court of Appeals for the Ninth Circuit. The Columbian National Life Insurance Company, a Corporation, Appellant, vs. A. Quandt & Sons, a Copartnership, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 5, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11152

A. QUANDT & SONS,

Appellee,

vs.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, a corporation,

Appellant.

STATEMENT OF POINTS RELIED UPON
ON APPEAL AND DESIGNATION
RECORD

The policy on which judgment was awarded against the appellant provided in the application therefor:

“It is agreed as follows: 1. That the insurance hereby applied for shall not take effect until the issuance and delivery of the policy and the payment of the first premium thereon while the proposed insured is in sound health.”

It is uncontradicted that the proposed insured had a cancer at the time referred to. He therefore was not in sound health, and the insurance never took effect. The judgment upon the policy against appellant therefore is in error.

The appellant hereby designates for printing the entire transcript.

KEESLING & KEIL,
FRANCIS CARROLL,

Attorneys for Appellant.

[Endorsed]: Filed October 9, 1945. Paul P.
Brien, Clerk.

No. 11,152

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE
COMPANY (a corporation),

Appellant,

VS.

A. QUANDT & SONS (a co-partnership),

Appellee.

BRIEF FOR APPELLANT.

KEESLING & KEIL,

FRANCIS CARROLL,

315 Montgomery Street, San Francisco 4,

Attorneys for Appellant.

FILED

JAN 1 1948

PAUL P. O'BRIEN,
CLERK

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE
COMPANY (a corporation),

Appellant,

vs.

A. QUANDT & SONS (a co-partnership),

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

This is an action brought upon a policy of life insurance, insuring the life of Theodore W. Quandt, issued by the appellant, The Columbian National Life Insurance Company.

The action was filed in the Superior Court of the State of California in and for the City and County of San Francisco, and was removed to the United States District Court, Northern District of California, Southern Division, by the appellant.

The amount sued for was \$15,000 and the appellant is a corporation organized and existing under the laws of the State of Massachusetts. (Tr. pp. 2, 3.)

Jurisdiction was conferred on the District Court by Section 24 of the Judicial Code, 28 U.S.C.A. 41.

Judgment was rendered in favor of the appellee. Jurisdiction of the appeal is conferred on this Court by Section 128a of the Judicial Code. (43 Stat. L. 936, 28 U.S.C.A. 225.)

The notice of appeal from the judgment of the District Court appears at page 40 of the transcript.

The judgment appears at page 38 of the transcript.

STATEMENT OF THE CASE.

The appellee, A. Quandt & Sons, was the beneficiary named in a policy of life insurance No. 275203 issued by the appellant on the life of Theodore W. Quandt.

The policy appears at page 7 of the transcript. It was applied for on November 15, 1943. It was delivered on December 4, 1943. Quandt died on April 2, 1944 from a cancer of the bowel.

The appellant denied liability on the policy on various grounds, and tendered a return of all premiums paid.

Thereafter the appellee filed suit on the policy. Appellant's answer to the appellee's complaint raised various defenses, among them that contained in its first separate answer and defense. (Tr. p. 26.) This defense set out:

That Part 1 of the application for the policy signed by the assured provided in part:

“It is agreed as follows: 1. That the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the Proposed Insured is in sound health.”

that Theodore W. Quandt was not in sound health on December 4, 1943, the date of the delivery to him of the policy of insurance, in that at this time he was suffering from cancer of the bowel, and that by reason thereof and of the provisions of the application the insurance provided for in the policy did not take effect.

The trial was had before the Court sitting without a jury. The Court found that Quandt was in sound health at the time of the delivery of the policy of insurance and that therefore the policy did take effect. (Tr. p. 36.) Judgment was thereupon rendered against the appellant for the face amount of the policy and this appeal has been taken by the appellant.

The question involved on the appeal is whether the trial Court erred in ruling that the assured, Theodore W. Quandt, was in sound health at the time mentioned and that the insurance therefore took effect.

It is not contended here that there is any evidence in the record that the assured knew that he was suffering from cancer at the time of the delivery of the policy. Nor, on this appeal, is any reliance had upon any concealments or misrepresentations made in the application for the insurance by the assured. Although such defenses were urged at the time of trial they are not urged here or relied upon as grounds for reversal.

SPECIFICATION OF ERRORS.

(1) The trial Court erred in making the following findings of fact:

No. 5 (Tr. p. 34): “* * * at the time of his death the policy of insurance set forth in the complaint was in full force and effect.”

No. 11 (Tr. p. 15): “That it is true that at the time of the delivery of said policy of insurance to Theodore W. Quandt, said Theodore W. Quandt, deceased, * * * in accordance with the terms of the policy of insurance was in sound health, and that it is true at said time of delivery said policy of insurance did go into full force and effect.”

No. 13 (Tr. p. 36): “That it is true that said Theodore W. Quandt had never had any disease, illness, injury, or operation other than those stated in the application for insurance.”

(2) The Court erred in making its conclusion of law that the appellee was entitled to recover against the appellant and in rendering judgment against appellant pursuant to said conclusion of law.

The said findings of the Court were in error because at the time of the delivery of the policy to Theodore W. Quandt he was not in sound health, but was in fact suffering from cancer of the bowel. The evidence in this regard is without conflict and the Court therefore erred in finding that the plaintiff was in sound health.

The application for the policy providing that the insurance was not to take effect unless it was delivered while the insured was in sound health, the Court

further erred in finding that the insurance did take effect and in rendering judgment upon it against the appellant.

SUMMARY OF ARGUMENT.

I.

A provision of an insurance contract: "That the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the proposed insured is in sound health" is a valid condition of the policy, and the insurance it provides does not take effect if the insured is not in sound health at the time of the issuance and delivery of the policy.

II.

The evidence without conflict shows that at the time of the issuance and delivery of the policy, the insured, Quandt, was afflicted with the cancer of the bowel which caused his death. The Court therefore erred in finding that the insured was in sound health at the time of the delivery of the policy.

III.

Since the insured was not in sound health at the time of the delivery of the policy, the insurance it provided did not take effect and no recovery could be had on the policy. The judgment rendered against the company was therefore in error and should be reversed.

ARGUMENT.

I.

A PROVISION OF AN INSURANCE CONTRACT: "IT IS AGREED * * * THAT THE INSURANCE HEREBY APPLIED FOR SHALL NOT TAKE EFFECT UNTIL THE ISSUANCE AND DELIVERY OF THE POLICY * * * WHILE THE PROPOSED INSURED IS IN SOUND HEALTH" IS A VALID CONDITION OF THE POLICY, AND THE INSURANCE IT PROVIDES DOES NOT TAKE EFFECT IF THE INSURED IS NOT IN SOUND HEALTH AT THE TIME OF THE ISSUANCE AND DELIVERY OF THE POLICY.

The application for the policy in question in Part I just above the signature of the applicant (Tr. p. 22) provides:

"It is agreed as follows: (1) that the insurance hereby applied for shall not take effect until the issuance and delivery of the policy and the payment of the first premium thereon while the proposed insured is in sound health."

This provision was made a part of the contract of insurance:

"This policy is issued in consideration of the application therefor, copy of which is attached hereto, and which is made a part of this contract * * *" (Tr. p. 7.)

The condition thus agreed to was valid and binding upon the parties to the insurance policy.

The law recognizes that the parties to an insurance contract, like the parties to any other contract, may agree that it becomes effective only upon the happening of a designated event. Or they may agree that it will not be effective at all until and unless a specified condition is in existence at a specified time.

Thus, the parties may make it a condition to the taking effect of the insurance that the assured be in sound health. To give effect to such an agreement they may provide in the policy of insurance that it will not take effect unless the insured is in sound health at the time of the delivery of the policy.

No rule of law says that such a provision is inoperative or that an insurer may not so limit its liability. If the agreement be stated in unambiguous language, it is a valid binding condition precedent to the taking effect of the insurance.

While the validity of this clause in an insurance policy apparently has not been passed upon by the Supreme Court of the State of California, the rule recognizing it has long been followed by the federal Courts and by the majority of the state Courts. As has been held:

“It is well settled that this clause in that contract, which provides that a policy shall not become effective unless delivered and received while the insured is in good health, is valid and will be enforced; and that the knowledge or acts of the insurer’s local agent, or of any person other than those named in the contract as empowered to modify it, shall not be binding upon the insurance company nor constitute a waiver of contract provisions. This is the established rule in the national courts and is supported by the weight of authority in state jurisdictions.”

Gill v. Mutual Life Insurance Co. (C.C.A. 8),
63 Fed. (2d) 967, 970.

“A stipulation in an application for a policy of life insurance, which is made a part of the policy

subsequently issued thereon, that such policy shall not take effect unless the same is actually delivered to the insured, during his life, and while he is in good health, is, except as restrained or forbidden by some statute, valid and enforceable. If the insured is at the time of the delivery of such policy actually afflicted with a disease which continues and ultimately causes his death, according to the weight of authority it is immaterial whether such condition existed at the date of his application or arose between that date and the delivery of the policy, or whether the insured knew his condition in that respect or not. In such cases such condition of health on the part of the insured at the time of the actual delivery of the policy is a defense to an action thereon, unless a valid waiver of such stipulation is shown.”

Wright v. Federal L. Ins. Co. (Tex.), 248 S. W. 325.

The cases cited in the footnote * show the application of the rule by Federal Courts and by State Courts in Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Ohio, Tennessee, Texas and Washington.

**Person v. Aetna Life Ins. Co.* (C.C.A. 8), 32 F. (2d) 459;
New York Life Ins. Co. v. Wertheimer (D.C. Ohio), 272 F. 730;
Subar v. N. Y. Life Ins. Co. (C.C.A. 6), 60 F. (2d) 239;
Gill v. Mutual Life Ins. Co. (C.C.A. 8), 63 F. (2d) 967;
Scharlach v. Pacific Mut. Life Ins. Co. (C.C.A. 5), 16 F. (2d) 245;
Aetna Life Ins. Co. v. Johnson (C.C.A. 8), 13 F. (2d) 824;
MacKelvie v. Mutual Ben. Life Ins. Co. (C.C.A. 2), 287 F. 660;

Connecticut:

Popwicz v. Metropolitan, 114 Conn. 333, 158 A. 885;
Keppel v. Metropolitan, 128 Conn. 591, 24 A. (2d) 888;

The cases holding to the contrary, it is submitted, are not based on sound reasoning and simply refuse, without any authority in law, to give effect to the agreement of the parties.

In this connection, the appellant respectfully points out that the language, by way of dictum, of this Court in *Mutual Life Insurance Co. v. Fray*, 71 Fed. (2d) 259, concerned a clause having different language from that in the case at bar, and that the Court's statement was made to depend upon this difference in the language. This Court there held that a finding of the jury that the assured was in good health could not be disturbed because the evidence on that question was conflicting.

Maryland:

Mutual Life Ins. Co. v. Willey, Md. Ct. of Ap., 106 A. 163;

Massachusetts:

Gallant v. Metropolitan L. Ins. Co., 167 Mass. 79, 44 N. E. 1073;

Barber v. Metropolitan Life, 188 Mass. 542, 74 N. E. 945;

Minnesota:

Murphey v. Metropolitan Life Ins. Co., 106 Minn. 112, 118 N. W. 355;

Missouri:

Farage v. John Hancock, Mo. Ct. of Ap., 81 S. W. (2d) 344;

Ohio:

Acacia Mutual Life Ins. Co. v. Kack, 57 O. Ap. 125, 12 N. E. (2d) 295;

Tennessee:

Commonwealth Life Ins. Co. v. Anglim, Ct. Ap. Tenn., 65 S. W. (2d) 239;

Texas:

Wright v. Federal Life Ins. Co., 248 N. W. 325;

Amer. Nat. Ins. Co. v. Jarrell, 50 S. W. (2d) 875;

Washington:

Logan v. New York Life Ins. Co., 107 Wash. 253, 181 Pac. 906.

The pertinent provision of the clause there in question provided:

“That the proposed policy should not take effect unless and until delivered to and received by the insured * * * during the insured’s *continuance* in good health * * *.” (Italics are appellant’s.)

The Court states in this regard that this condition was fulfilled if delivery of the policy was made while the insured was in the same state of health as he was at the time of his application and physical examination. It so held, it stated, because the language *continued* good health *relates* to the health of the applicant *as represented by him in his application* and medical examination; *implies* that the applicant *was then* in good health and requires merely a continuance of that state of health, whatever it may have been.

The statement of the Court in that case, it is respectfully submitted, is not in point in regard to the provision of the policy before the Court in the instant case. The language here is *not continued* good health. It does *not* relate to the health of the applicant as it was at the time of his application, and does *not* require merely that the applicant continue to be in the same state of health as he was at the time of his medical application.

Rather the language of the application in the instant case is an out and out requirement, without qualification, that the proposed insured be in sound health at the time of the delivery of the policy—regardless of his health at the time of the application:

“* * * the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the proposed insured is in sound health.”

This language is unambiguous and direct. It leaves room for no construction and no interpretation except that it means just what it says, namely, that the insurance would not take effect until the delivery of the policy while the proposed insured is in sound health. The language that made possible the Court's statement in *Mutual Life v. Fray* is not present in the instant case. The Court's statement in that case, therefore—regardless of whether it be correct, or in conflict with the prevailing law—is not determinative of the instant case.

The identical language involved in the instant case was before the Circuit Court of Appeals for the Second Circuit in regard to another policy issued by the appellant here. In holding that the general rule did apply to this language that Court said:

“It was undisputed that the death of the plaintiff's intestate was caused by cancer within three months after the date of each policy. It is likewise beyond dispute that the parties to the policies expressly agreed that the insurance would not take effect until the payment of the first premium was made while the proposed insured was in sound health. This was a valid condition upon the validity of the policies as contracts of insurance. *Subar et al. v. New York Life Ins. Co. (C.C.A.) 60 F. (2d) 239, * * **

“As the evidence in this case, considered in its entirety, did not show that the deceased was in

sound health when the policies were delivered, it was not proved that the insurance ever went into effect, and the motion to direct verdicts for the defendant should have been granted. * * *

“Because a new trial will be required, it is well to express our views on the burden of proof on the issue of sound health. There is authority to the effect that such a clause as these policies contained regarding the effective date of the insurance makes the question of sound health only a matter of defense, but that view seems to give too little force to the fact that the parties expressly agreed that no insurance should take effect until the policies were delivered and the first premiums paid while the proposed insured was in sound health. Regardless of what may be necessary in any particular case to prove sound health as of the decisive time either *prima facie* or ultimately, we think it is a condition precedent with the burden on the plaintiff to prove it by a preponderance of all the evidence in order to show that the defendant ever became bound as an insurer. *New York Life Ins. Co. v. McCreary* (C.C.A.) 60 F. (2nd) 355.”

Greenbaum v. Columbia Nat. Life Ins. Co.
(C.C.A. 2), 62 Fed. (2d) 56.

It is respectfully submitted, therefore, that, in accordance with the authorities cited, the provision of the application in question is a valid binding condition of the policy of insurance, and that the insurance does not take effect if the insured be not in sound health at the time of the delivery of the policy.

II.

THE EVIDENCE WITHOUT CONFLICT SHOWS THAT AT THE TIME OF THE ISSUANCE AND DELIVERY OF THE POLICY THE INSURED, QUANDT, WAS AFFLICTED WITH A CANCER OF THE COLON WHICH CAUSED HIS DEATH. THE COURT THEREFORE ERRED IN FINDING THAT THE INSURED WAS IN SOUND HEALTH AT THIS TIME.

The policy of insurance in question was delivered to the insured, Quandt, on the 4th day of December, 1943. He died on the 2nd day of April, 1944, of cancer of the bowel. (Tr. p. 78.)

The only testimony given on the question of whether Quandt had the cancer at the time of the delivery of the policy was that given by the witness, Dr. Warren L. Bostick, official deputy surgeon for the coroner of the City and County of San Francisco, and a pathologist in the Department of Pathology of the Medical School of the University of California. Dr. Bostick performed the autopsy on the body of the assured. In regard to whether the cancer had been present at the time of the delivery of the policy he testified:

“Mr. Carroll. Q. Will you state to the Court, doctor, what you determined to be the cause of his death?

Dr. Bostick. A. I did a complete examination on the body and upon opening the abdomen I saw immediately a diffused inflammation of all the abdominal contents; and further examination revealed a large mass in the region of the right portion of the abdomen, and this mass was a cancer, which cancer had spread, not only from the right side of the bowel but I also found it distributed and small nodules all through the liver. The cause

of death was a rupture of this cancer mass into the free abdominal cavity, with generalized inflammation.

Q. Doctor, can you give us an idea of the size of this cancer?

A. Well, as I examined it, the mass involved an area with a diameter of approximately six inches. It completely obliterated almost all the structure of the bowel on the right side, the large bowel.

Q. Doctor, how many of these autopsies have you done, approximately?

A. About three thousand.

Q. Basing your opinion, Doctor, on your experience and learning, can you indicate to the Court approximately how long that cancer had been there, or when it had commenced?

Mr. Dorn. That is objected to as irrelevant, incompetent, and immaterial.

The Court. Objection overruled.

A. That cancer had been there at least a year, based on what I have seen in a good many years of cancers, and from the general feeling that it takes a cancer approximately one year to completely surround a segment of the bowel; and this had, of course, much more than done that. It had invaded extensively into the surrounding tissue, and had also spread into the liver.

Mr. Carroll. Q. You say, Doctor, it had been there a minimum of a year?

A. Correct.

Q. In your opinion might it have been there longer?

A. It could have been.

Q. Doctor, the date of your examination I believe was the same day the death occurred?

A. I examined the patient on April 2, 1944. * * *” (Tr. pp. 78 and 79.)

“Q. Doctor, is there any question in your mind, basing your answer on your experience and learning, that this cancer existed in this man in November, 1943, approximately five months prior to his death?

A. Oh, absolutely no doubt. There is not the slightest possibility that there was no cancer there. There is, positively.” (Tr. p. 87.)

No other testimony was offered regarding the existence of the cancer at the time of the delivery of the policy. *Thus the evidence in the record is uncontradicted and without conflict that the assured had the cancer at the time of and prior to the delivery of the policy.*

It is respectfully submitted therefore that the Court's finding that the insured was in sound health at the time of the delivery of the policy is directly contrary to the only evidence on the subject.

CONCLUSION.

The evidence showing without conflict that the assured did have a cancer at the time of the delivery of the policy, as a matter of law he was not in sound health at that time, and since the application stated that the insurance did not take effect if he were not in sound health, the insurance provided by the policy did not take effect and no recovery can be had upon

the policy. It is submitted therefore that the judgment against appellant upon the policy is in error, and that it should be reversed.

Dated, San Francisco,
January 11, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Appellant.

No. 11,152

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE
COMPANY (a corporation),

Appellant,

VS.

A. QUANDT & SONS (a co-partnership),

Appellee.

BRIEF FOR APPELLEE.

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THE COLUMBIAN NATIONAL LIFE INSURANCE
COMPANY (a corporation),

Appellant,

vs.

A. QUANDT & SONS (a co-partnership),

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Upon the solicitation of the agent of the appellant, Mr. J. H. Wood (Tr. p. 48), Mr. Theodore W. Quandt signed the application for insurance with the appellant company on the 15th day of November, 1943. The medical examination by Dr. George W. Cox, appellant's physician, was apparently signed on the 13th day of November, 1943. The policy of life insurance was delivered to A. Quandt & Sons, a co-partnership of which the deceased Theodore W. Quandt, was a member, on the 4th day of December, 1943. Mr. Quandt, the insured, died on April 2, 1944. At the time the policy of insurance was delivered, the

premium required to be paid was paid to the agent of the appellant.

It is our contention that the life insurance policy went into effect at the time of its delivery on the 4th day of December, 1943.

At the time of the trial of the action in the District Court, there were a great number of objections raised as to the validity of the policy of insurance but all of these have been abandoned by appellant (Appellant's Brief, p. 3), so that there is but one question now presented to the Court for consideration upon this appeal.

One of the paragraphs of the application for life insurance, which is attached to and made a part of the policy of insurance (Tr. p. 22) reads as follows:

"It is agreed as follows: 1. That the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the Proposed Insured is in sound health."

ARGUMENT.

I.

THE WORDS "SOUND HEALTH" AND THE WORDS "GOOD HEALTH" AS USED IN AN INSURANCE POLICY HAVE BEEN DEFINED BY A NUMBER OF DECISIONS, BOTH IN STATE COURTS AND IN THE UNITED STATES CIRCUIT COURTS.

In the case of *Burr v. Policy Holders Life Insurance Association*, 128 Cal. App. 563, 566, the Court defined the term "good health" as follows:

“The term ‘good health’ in a life insurance policy or application is comparative, and an assured is in good health unless affected with a substantial attack of illness threatening his life. It does not mean perfect health; nor would it depend upon ailments slight and not serious in their natural consequences.”

Maine Benefit Assn. v. Parks, 81 Me. 79, 10 Am. St. Rep. 240;

Wills v. Policy Holders Life Insurance Association, 12 Cal. App. (2d) 659, 666;

Turner v. Redwood Mutual Life Assurance Company, 13 Cal. App. (2d) 573, 580.

In *Cooley’s Brief on Insurance*, page 3296, it is said with respect to the use of the term “good health”:

“If the applicant is free from apparent sensible disease and unconscious of any derangement of important organic functions, he may truthfully say he is in good health.”

In *Northwestern Mutual Life Insurance Company v. Wiggins*, decided November 1, 1926 by this Court, 15 Fed. (2d) 646, 648, the Court said:

“Good health, illness and disease must be considered in an application for insurance, not in the light of scientific, technical definitions but in the light of the insured’s understanding in connection with which the terms are employed in the examination.”

II.

THE APPELLEE AND INSURED HAD NO KNOWLEDGE OF ANY KIND THAT AT THE TIME THE INSURANCE POLICY WAS WRITTEN AND DELIVERED THAT HE HAD ANY AFFLICTION OF ANY KIND OR CHARACTER AND UNKNOWN PHYSICAL CONDITIONS DO NOT NULLIFY THE POLICY OF INSURANCE.

There is no evidence of any kind in the record that discloses that the insured, Theodore W. Quandt, had any knowledge of any kind or character that at any time he was afflicted with a cancer. It is now admitted by the appellant (Appellant's Brief, p. 3) that the assured had no knowledge at the time of delivery of the policy that he was suffering from a cancer or any other ailment.

It is our contention that if the deceased did not know of any ailment that he could not and did not make any false representation that would nullify the policy of insurance. The appellant in his brief (p. 3) has stated, "Nor, on this appeal is any reliance had upon any concealment or misrepresentations made in the application for the insurance by the assured." However, appellant does claim that because of the provision in the life insurance policy that the insured must be in "sound health" when the policy is delivered, and as the insured in this case is claimed not to have been in "sound health", that the policy never took effect.

It must be conceded that if Mr. Quandt, the insured, had any knowledge that he was suffering from cancer at the time the policy was delivered that it would be

concealment and indirect misrepresentations on his part of a sufficient character to nullify the policy.

A very similar case involving almost the same facts is the case of *Wills v. Policy Holders Life Insurance Association*, 12 Cal. App. (2d) 659, 663. In this case the questions asked in the application were as follows:

“Q. Are you now in good health?

A. Yes.

Q. Have you any knowledge that any physical or mental disease exists in your system?

A. No, I am in good health, and so far as I know have no disease or other conditions which would prevent me from obtaining life insurance.”

At the trial of this case the Court found that it was not true that “she was now in good health” and decided the case against her and in favor of the insurance company. Upon appeal the decision was reversed, and in doing so the Court used the following language:

“In spite of the fact that the autopsy disclosed a chronic heart disease which must have been developing for some time, there is not a syllable of evidence to indicate that the insured possessed knowledge of that fact. Nor is there any evidence that symptoms of the disease existed which should have warned a reasonable person of its presence. Nor are there any facts from which we may presume that the deceased knew of the existence of that disease. In truth, the affirmative evidence is just the contrary. She carried other insurance. She consulted no physician. She had worked constantly several years past. She appeared well, and she never complained of illness or ailment, even to

her friend and the beneficiary named by her in the policy. We are persuaded the insured did not know of the existence of any serious physical ailment when she applied for the policy. Certainly the defendant failed to prove that she had any such knowledge. The judgment is therefore not supported by the evidence.”

In *Clark v. New Amsterdam Casualty Company*, 180 Cal. 76, 80, in considering an accident policy of insurance, the Court used the following language:

“It has been held that the existence of unknown conditions tending to shorten the life of the assured does not nullify the policy.” (Citing *Stan-yan v. Security Life Insurance Company*, 91 Va. 83, and *Freeman v. Mercantile Mutual Assurance Company*, 156 Mass. 351.)

In the case of *Wills v. Policy Holders Life Assurance Co.*, 12 Cal. App. (2d) 659, 665, the Court said:

“The burden was on the defendant to prove not only that the insured was afflicted with serious heart disease at the time she signed her application for membership but also that she knew that she had that ailment. *Weiss v. Policy Holders Life Assurance Co.*, 132 Cal. App. 532, 536, 23 Pac. (2d) 38. The defendant failed to sustain this burden.”

As the appellant in the case at bar did not show or prove that Mr. Quandt had any knowledge that he was suffering from cancer, of necessity he has failed in his proof, but to make the matter still stronger, the appellant has admitted that Mr. Quandt had no knowledge of any kind or character.

It being conceded by everyone connected with this case that the insured, Theodore W. Quandt, had no knowledge that he was afflicted with a cancer, it is hard to understand how he can be charged with concealment, misrepresentations or of any wrongdoing in accepting the policy of insurance, and it is equally hard to understand why the policy of insurance did not take effect immediately upon its delivery.

III.

THERE IS A CONFLICT OF TESTIMONY WITH REFERENCE TO THE INSURED'S SOUND HEALTH, AND AS THE TRIAL COURT FOUND IN FAVOR OF THE PLAINTIFF AND APPELLEE, THIS COURT WILL NOT DISTURB THE FINDING.

Appellant in his brief has stated that the insured was afflicted with a cancer of the colon and that the testimony with reference to that is uncontradicted. Appellant is in error in this respect because there is other testimony produced on behalf of the plaintiff and appellee, and as there is a conflict of testimony upon this subject, we understand the rule to be that the Circuit Court of Appeals will not disturb or reverse the judgment.

Mr. J. H. Wood, the agent and representative of appellant, was called on behalf of plaintiff, and among other things, testified as follows (Tr. pp. 47 and 48) :

“Q. Did you know Mr. Quandt very well during his lifetime?

A. Quite well from the point of view of insurance and some of his personal affairs.

Q. You saw him very often?

A. Reasonably so, yes.

Q. At any of the times you have seen him and talked to him did he complain of any illness?

A. No.

Q. At the time you delivered the policy, as far as appearances were concerned, was he in sound health?

A. Perfectly so, yes."

Dr. George W. Cox, the examining physician for the appellant herein, was called on behalf of plaintiff, and among other things, testified as follows (Tr. p. 50):

"Q. At the time you made your examination of Mr. Quandt, did you make a thorough examination of him?

A. I think I did. I always do."

(Tr. p. 51):

"Q. What examination, if any, did you or could you make of the digestive organs?

A. Well, you bare the abdomen and see if there is evidence of anything unusual in the abdominal cavity.

Q. What did you find?

A. I did not find anything abnormal in it.

Q. As a matter of fact from your examination did you find the applicant at the time of your examination in sound health?

A. I recommended him for insurance.

Q. You found no ailment of any kind as far as the applicant was concerned?

A. Well, I found nothing that would be of consequence to the insurance company at least.

Q. Did you find anything?

A. I do not remember anything that was wrong."

(Tr. p. 52):

“Q. What would be the usual examination that might be made to discover whether a patient was suffering from cancer.

A. Well, one of the first things we would have would be an X-ray or make a microscopic examination but you do not go through that unless you have symptoms.

Q. You found at the time of making this examination no symptoms that warranted you in making any further examination to find out about any cancer? Is that correct?

A. That is correct.”

Dr. V. A. Mitchell was called on behalf of plaintiff and testified in part as follows (Tr. p. 58):

“Q. You made a thorough examination of him at that time?

A. I gave him a complete physical examination at that time.”

(Tr. p. 61):

“Q. What would you say, doctor, with reference to his general health on November 18, 1943 at the time you made your last examination?

A. Well, as far as I was aware at that time Mr. Quandt was in perfect health.

Q. When you say perfect, you mean, you are using the word of the policy, sound health?

A. Yes.

Q. At the various times you made your examination of Mr. Quandt was there anything, or any indication to you as a medical man that he was afflicted with cancer?

A. No, he never complained of any abdominal pains. He made no complaint of his stool. He

made no complaint as to vomiting and never made any complaint about any obstruction.”

(Tr. p. 62):

“Q. Now doctor, is it possible for a patient to be afflicted with cancer such as Mr. Quandt had and he not know it?

A. Yes.

Q. And of course you found no indication at any time in your examination or your visit with him that he was afflicted with cancer?

A. No.”

The testimony on behalf of appellant in this case with reference to the cancer was obtained from the autopsy surgeon who testified that the cause of death was cancer which was of some six months duration. The testimony we have quoted from shows conclusively a very serious conflict of the testimony with reference to the question of the insured's “sound health”, and under those conditions, this Court will not interfere with the decision rendered in the District Court.

It is quite apparent that the trial judge believed the testimony on behalf of the plaintiff as heretofore quoted and if he believed the testimony, it is not within the province of the Appellate Court to reverse the decision. It is only when there is no testimony upon the subject or no testimony of probative value that the Court will reverse the decision.

In the case of *Mutual Life Insurance Company*, appellant, *v. Frey*, appellee, decided by this Court,

and reported in 71 Fed. (2d), 259, 261, Walter E. Frey made application for insurance on March 4, 1932. He was examined by the company's doctor, Dr. Allen, on March 5, 1932 and found in "good health" and Dr. Allen so reported it to the appellant. The insured died May 4, 1932. Dr. Berger performed an autopsy and testified the cause of death of the insured was acute dilation of the heart, chronic myocarditis and coronary sclerosis with occlusion, the latter being the immediate cause of death.

"The appellant argues that in view of the facts disclosed by the autopsy, the insured could not have been in good health at the time the policies were delivered."

"Continued good health is a relative term and manifestly relates to the representations made in the application, and medical examination, as to health. In the absence of fraud, misrepresentation or concealment, the condition of the applicant is fulfilled when delivery is made while the insured is in the same state of health as at the time of the application and medical examination. There is no claim in the case at bar that the insured's health changed between the date of the application and physical examination and the date of the delivery of the policies. We agree with the rule stated in *Mutual Life Insurance Co. of New York v. Hoffman*, 77 Ind. App. 209, 133 Northeastern, 405, 409, as follows:

"The provision that unless the first premium shall have been paid and the policy shall have been delivered to the applicant during his continuance in good health implies that the applicant

was in good health when the application was made. Whether the insurance company issued a policy depended upon the statements contained in the application and in the medical examination. The clause in question has no reference to any unsoundness of health at the time of or previous to the application and medical examination. It refers solely to a change in the condition of health after making the application and medical examination, and when it is not shown that the alleged unsoundness of health did not occur between the date of the application and medical examination and delivery of the policy, the insurance company must rely on the statements in the application and medical examination to void a recovery on the policy and not upon the claim in question.'

"The jury determined the issues in favor of appellee, and there is substantial evidence to support that conclusion so that a verdict of the jury is conclusive in this respect. *Inter-Southern Life Insurance Company v. McElroy*, 38 Fed. (2d), 557, 559."

In the case of *Lincoln National Life Insurance Company v. Mathisen*, 150 Fed. (2d) 292, the insurance company brought an action to cancel the life insurance policy issued on the life of Mathisen, March 15, 1943. He died May 12, 1943. Relief was denied the plaintiff and a judgment rendered for the amount of the policy to the defendant. It is claimed by the appellant that at the time of the delivery of the policy and payment of premium thereon, Mathisen was not in "good health". This fact was not dis-

closed to the appellant. The provision of the life insurance policy is as follows:

“The insurance hereby applied for shall not be considered in force until the policy is issued by the company * * * and said policy manually received * * * during good health, and the first premium paid.”

The Court also said:

“Whatever doubts reside in the record by reason of sharp conflict over facts had to be resolved by the trial Court. Its findings are complete to cover contraverted issues of fact. Unless they are clearly erroneous, they must stand if they are supported by competent evidence of prohibitive value. See Rule 52(a) Rules of Civil Procedure, 28 U. S. C. A. following Section 723(c).”

“It is clear from the record that the Court was of the view that on the issues of “good health” as of the delivery and acceptance date, the cases of *Wills v. Policy Holders Life Insurance Company* (1936), 12 Cal. App. (2d), 659, 666, and *Burr v. Policy Holders Life Assurance Company* (1933), 128 Cal. App., 563, 17 Pac. (2d), 1014, were decisive under California law and required the health issue to be resolved against appellant.”

It is to be noted that the facts and the terms of the insurance in question in this case are almost identical with the case at bar, but the Appellate Court approved the decision rendered in the District Court upon the ground that there was some conflict of medical testimony and that the term “good health”

had application as of the delivery and acceptance date.

The record does not show that the deceased, Theodore W. Quandt, knew at the time of making application for insurance and medical examination anything about any ailment that he had.

The last two cases hereinbefore cited and both decided by this Court are on all fours with the case at bar and are decisive of this appeal. The facts involved in each of them are almost identical with the case at bar and the provisions in the insurance policy are also almost identical.

CONCLUSION.

It is our contention that as the insured did not know at the time of his application for insurance and the medical examination that he was afflicted with a cancer that this policy of insurance nevertheless took effect. It is to be noted that two physicians examining him found no symptoms or indication of any kind that he was afflicted with cancer at the time the application was made. It is reasonable to assume from this testimony that he was not at that time afflicted with a cancer.

There is no claim on this appeal of misrepresentations or concealment. As the policy of insurance was prepared by the insurance company, it must of necessity be construed strictly against the company.

Under the conditions we respectfully submit that the decision of the District Court should be approved.

Dated, San Francisco,
January 28, 1946.

C. M. DAWSON,
WALTER E. DORN,
Attorneys for Appellee.

No. 11,152

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For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE
COMPANY (a corporation),

Appellant,

VS.

A. QUANDT & SONS (a co-partnership),

Appellee.

APPELLANT'S REPLY BRIEF.

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VS.

A. QUANDT & SONS (a co-partnership),

Appellee.

APPELLANT'S REPLY BRIEF.

I.

KNOWLEDGE OF CANCER BY THE INSURED IS NOT IN ISSUE IN THIS CASE.

The appellee's brief contains pages of arguments regarding an insured's lack of knowledge of a disease which an insurance company claims was concealed from it. None of this matter is relevant here for these reasons:

A. The Appellant Admits Quandt Had No Knowledge of the Cancer.

In appellant's opening brief it was pointed out that no claim is made that the insured knew he was suffering from cancer. The point of knowledge therefore is

not in issue, nor was it at the time of the trial. As will be again pointed out, later in this brief, knowledge is not an element of the defense upon which the appellant relies under the sound health clause of the policy.

B. No Claim Is Made That the Insured Concealed From the Company a Knowledge of Cancer.

It was also pointed out in appellant's opening brief that on this appeal no reliance is had upon any concealments or misrepresentations; the appellant rests solely on the sound health clause of the policy.

It is of course the law that an insurance company seeking to avoid a policy because of concealments made in the application for the insurance must prove that the applicant had knowledge of the diseases or matters concealed. However, this rule has no application whatever to this appeal where it is not claimed there was any concealment. The discussion, therefore, by the appellee on pages 5 and 6 of its brief and the cases there cited regarding concealment and proof of knowledge have no bearing whatever on the questions here before the Court.

C. Knowledge Is Not an Element of the Defense Under the Sound Health Clause. If the Insured Be Not in Sound Health at the Time of the Delivery of the Policy the Insurance Does Not Take Effect, Regardless of Whether He Knows of the Condition of His Health.

At the outset, it may be pointed out that the appellant has no quarrel with the definition of "good health" stated in *Burr v. Policy Holders Life Insurance Association*, 128 Cal. App. 563. However, we

point out that the appellee in its statement of this definition on page 3 of its brief, inadvertently, no doubt, has omitted a portion of the definition stated in the decision. The definition there stated at page 566, with the portion omitted by the appellee in italics, is as follows:

“The term ‘good health’ in the life insurance policy or application is comparative, and an assured is in good health unless affected with a substantial attack of illness threatening his life *or with a malady which has some bearing on the general health*. It does not mean perfect health; nor would it depend upon ailments slight and not serious in their natural consequences.”

No one will contend that a person suffering from cancer is not afflicted with “a malady which has some bearing on the general health”.

Nor has appellant any quarrel with the definitions of good health, illness and disease as stated in *Northwestern Mutual Life Insurance Co. v. Wiggins*, 15 Fed. (2d) 646, at 648. Certainly anyone, layman or otherwise, understands that a person who has cancer is not in good health, and must understand that a policy which states that it does not take effect unless the insured be in good health does not take effect if the insured, in fact, has cancer.

The provision of the application and of the policy in the instant case upon which the appellant relies is:

“It is agreed * * * that the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the proposed insured is in sound health.”

This provision has nothing to do with any misrepresentations or concealments by the insured. It does not depend upon the insured's knowledge of his lack of sound health. It does *not* say the policy will not take effect *only if* the insured knows he is not in sound health, or *only if* he conceals this fact.

Rather the provision is an outright, unqualified, agreement that if the insured in fact be not in good health then the insurance does not take effect. Its effect does not depend upon his knowledge.

The appellee apparently concedes that no rule of law prevents the parties to an insurance contract from entering into such an agreement. Its brief does not claim the clause to be invalid and it cites no decision holding it to be invalid. Neither *Clarke v. New Amsterdam etc.* or *Wills v. Policy Holders etc.*, cited on page 6 of the appellee's brief, so holds.

Nor do these decisions hold that, in order to establish a defense under the sound health clause, it is necessary to prove that the applicant had knowledge of his lack of sound health; in fact, the clause in question is not even involved in the cases cited:

1. The *Wills* case holds merely that a company attempting to avoid a policy on the ground that the assured concealed the existence of a disease from the company must prove not only that the assured was afflicted with the disease but also that he was aware of it.

2. The *Clarke* case is no more in point. This was a suit on an accident policy in which the question at

issue was whether the assured's death was caused solely by accidental means. The company contended that heart disease contributed to the assured's death. The Appellate Court ruled, and obviously properly, that there was sufficient evidence to support the jury's conclusion that no heart disease existed in the assured. As is indicated at page 79 of the decision the evidence in this regard showed:

"Just before the operation a slight leak of the tricuspid valve was discovered but according to the testimony of his physician the heart was then functionally normal and was propelling the blood through the body. The autopsy revealed no abnormal condition of the lungs or liver indicative of any chronic heart condition."

This evidence obviously justified the jury's conclusion.

The language from the Clarke decision quoted by appellee on page 6 of its brief has been lifted by counsel from the following statement made by the Court at page 79 of the decision in discussing other evidence regarding the heart condition:

"But there was no showing that this condition was pathological or that it was even unusual in a man of the age of the assured. Naturally, a man of sixty or more would have less power to resist evil consequences resulting from an accident than a younger person would possess, but an insurer accepting as premiums the money of a client of advanced years may not complain of that fact. It has been held that the existence of unknown conditions tending to shorten the life of the as-

sured does not nullify a policy. (Citing cases.) It may be conceded that morbid conditions induced by bodily injury may be more readily caused and more deadly in result when the victim is an aged person than in the case of a healthy youth, but that concession would not excuse the insurer of the maturer individual. If the accidental injury produces morbid change in the exercise of vital functions, which in turn results in death, the injury and not the morbid change is held to be the cause of death."

The lone sentence plucked by counsel from this discussion obviously has no bearing on the issue before this Court.

On the other hand, as has been pointed out at page 6 and the following pages of our opening brief, the Courts hold the sound health clause to be a valid binding agreement. Its effect does not depend upon knowledge by the assured. If the assured in fact is not in sound health at the time of the delivery of the policy then the insurance provided thereby does not take effect, regardless of any knowledge of the insured of his lack of sound health:

"If the insured is at the time of the delivery of such policy actually afflicted with a disease which continues and ultimately causes his death, according to the weight of authority it is immaterial whether such condition existed at the date of his application or arose between that date and the delivery of the policy, *or whether the insured knew his condition in that respect or not.* In such cases such condition of health on the part of the insured at the time of the actual delivery of

the policy is a defense to an action thereon, unless a valid waiver of such stipulation is shown.” (Italics ours.)

Wright v. Federal Life Ins. Co. (Tex.), 248 S. W. 325.

The matter cannot be stated more clearly than it was by the Court in *Murphey v. Metropolitan Life Insurance Co.*, 116 Minn. 112, 118 N. W. 355, cited in our opening brief at page 9, in which the Court said:

“It is clear from the language of the policy that the defendant’s promise of insurance was not absolute, but conditional, and that the existence of life and sound health in the insured on the date of the policy is the condition upon which the promise is made. *It is the fact of the sound health of the insured which determines the liability of the defendant, not his apparent health, or his or any one’s opinion or belief that he was in sound health.*” (Italics ours.)

The sole question remaining on this appeal therefore is whether the appellant is correct in contending that the evidence shows without conflict that the assured Quandt, at the time of the delivery of the policy, was afflicted with a cancer of the bowel which caused his death. If he had such a cancer it necessarily follows that he was not in sound health. The appellee’s contention, at page 7 of its brief, that there is a conflict in the testimony in this regard is next considered.

II.

THE TESTIMONY OF DR. BOSTICK THAT THE INSURED HAD A CANCER AT THE TIME OF HIS DEATH ON APRIL 4, 1944, AND AT THE TIME OF THE DELIVERY OF THE POLICY ON DECEMBER 4, 1943, IS UNCONTRADICTED. THERE IS NO CONFLICT WITH THIS TESTIMONY.

It is true, as appellee points out and indeed it is admitted for purposes of this appeal by the appellant, that at the time his application was taken in November, the assured Quandt appeared to be in sound health. The witness Wood so testified. Likewise there was testimony, and it is also admitted by the appellant, that Dr. Cox and Dr. Mitchell who examined him in November and in March, respectively, of 1943, then found him to be in apparent good health and neither found evidence of cancer.

Neither doctor suspected he had a cancer of the bowel and neither examined him for the express purpose of determining if he had a cancer there or elsewhere.

Neither doctor denied or so much as questioned that Quandt had a cancer on April 2, 1944 and died of it. Neither denied that he had the cancer when the policy was delivered on December 4, 1943, 4 months earlier; neither questioned it—in fact they were not even asked if Quandt then had a cancer. To the contrary the implication of their testimony is that Quandt had the cancer but was unaware of it, which was undoubtedly the fact. Thus Dr. Mitchell testified when examined by counsel for the appellee:

“Q. You know the ailment that caused the death, or contributed to the death of Mr. Quandt?

A. I do.

Q. What was that?

A. From what I understood, he had a carcinoma, a cancer.

* * * * *

A. Now, Doctor, is it possible for a patient to be afflicted with cancer such as Mr. Quandt had and he not know it?

A. Yes."

(Tr. pp. 61, 62.)

Likewise Dr. Cox under examination by counsel for appellee testified:

"Q. Doctor, is it possible for a patient to be afflicted with cancer and not know it?

A. Surely, it depends upon how far it has advanced.

Q. Then as I take it he might have cancer and not know it, himself?

A. He could for quite some length of time, that is true."

(Tr. p. 53.)

And each doctor testified that they would not regard a person having cancer as one who was in sound health. (Tr. pp. 53, 63.)

In this testimony we submit there is no contradiction of the testimony given by Dr. Bostick. He testified that he found on the autopsy, and that Quandt did in fact have, and died from, on April 4, 1944, a cancer of the bowel approximately six inches in diameter. How long this cancer had existed, particularly whether it was in existence 4 months earlier on December 4, 1943, the date of the delivery of the policy, was

the question before the trial Court. *The only evidence* offered on that subject was the testimony of Dr. Bostick. He testified positively not only that the cancer was then in existence but that in his opinion it had been in existence for at least a year, that is, since April of 1943. Particularly he testified that beyond any possibility of a doubt it was in existence at the time the policy was delivered:

“Q. Doctor, is there any question in your mind, basing your answer on your experience and learning, that this cancer existed in this man in November, 1943, approximately five months prior to his death?

A. Oh, absolutely no doubt. There is not the slightest possibility that there was no cancer there. There is, positively.”

(Tr. p. 87.)

We repeat that *this testimony is uncontradicted*. Nothing said by Dr. Cox or Dr. Mitchell is in conflict with it. Neither denied that he had a cancer at the time in question *nor indeed even expressed any opinion as to whether he did or did not then have a cancer*.

Under these circumstances it is submitted that there is no conflict in the evidence on the question whether the assured had a cancer at the time of the delivery of the policy. Cases cited by the appellee in its brief hold nothing to the contrary: *Mutual Life Insurance Co. v. Frey*, cited by the appellee, has already been discussed by the appellant at page 9 of its opening brief. As is there pointed out, the language of the policy in the *Frey* case is different from that involved

in the instant case and was held merely to require that the assured be in the same condition of health on the date of the delivery of the policy as he was at the time the application was taken. The Court there held, and under the evidence correctly, that there was no claim in that case that the assured's health had changed between the dates in question and therefore sustained the verdict of the jury that the applicant was in the soundness of health required by the application. This case obviously does not support appellee's contention that there is a conflict in the evidence in the present case.

Nor is *Lincoln National Life Ins. Co. v. Mathisen*, 150 Fed. (2d) 292, authority for appellee's position. The trial Court there found that delivery of a policy was made on April 14, 1943 and that the applicant was then in good health. On appeal it was held that these findings were supported by conflicting evidence. What was the evidence presented on the issue of good health or as to the cause of death does not appear from the opinion and it is impossible to determine what evidence was held to create a conflict sufficient to support the Court's finding. All that appears in the opinion is the Court's statement that the trial Court's finding rested "on conflicting testimony, including that of medical experts". What the evidence was is not stated. This case therefore cannot possibly be said to be authority that a conflict exists in the evidence in the case now before the Court.

It is submitted that on the question at issue, namely, whether the cancer from which the assured died ex-

isted at the time of the delivery of the policy, there is only the testimony of Dr. Bostick, and that this testimony is uncontradicted. Under well settled law the trial Court is bound by this testimony. This has long been true in the State of California as to questions of this character :

“The rule to be drawn from these decisions, as we understand them, appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases, neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses. The same rule would, of course, apply to a proceeding before the Industrial Accident Commission. Under this rule, the Commission, in the present proceeding, could not reject the evidence of the medical experts when testifying upon any subject peculiarly within their own knowledge. The same rule would apply as to opinions of the medical experts upon a subject solely within their professional knowledge, and not within the knowledge of the ordinary individual. In this proceeding the evidence of the medical experts as to the condition of the deceased’s skull at the time of the autopsy, and the presence therein of the fracture, and the two hemorrhages, the extent and character of these hemorrhages, and their origin and cause, and the probable effect upon the deceased, and whether they, or either of them, was sufficient to produce death, dealt entirely with matters with which only medical men are familiar, and con-

cerning which they alone could give any intelligent information to the Commission. This evidence, being uncontradicted, was binding upon the Commission and, according to the above rule, the latter could not reject the same and act upon their own knowledge or conclusions.”

*William Simpson Construction Company et al.,
v. Industrial Accident Commission et al.*, 74
Cal. App. 239, 243.

There is, we submit, no conflict in the evidence on the question at issue.

CONCLUSION.

It is respectfully submitted that the evidence without conflict shows that the insured Quandt had a cancer of the bowel at the time of the delivery of the policy. He cannot therefore be held to be in sound health and the Court's finding in this regard is without support in the evidence and contrary to it.

Since the policy provided that the insurance was not effective if the assured was not in sound health at the time in question no recovery can be had upon the policy and the judgment should be reversed.

Dated, San Francisco,
February 11, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Appellant.

No. 11,152

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE
COMPANY (a corporation),

Appellant,

VS.

A. QUANDT & SONS (a co-partnership),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

KEESLING & KEIL,

FRANCIS CARROLL,

315 Montgomery Street, San Francisco 4,

*Attorneys for Appellant
and Petitioner.*

FILED

MAY 22 1946

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No. 11,152

IN THE

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For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE
COMPANY (a corporation),

Appellant,

vs.

A. QUANDT & SONS (a co-partnership),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Francis A. Garrecht, Presiding
Judge, and to the Honorable Associate Judges of
the United States Circuit Court of Appeals for
the Ninth Circuit:*

The appellant respectfully petitions the Court to grant a rehearing in this matter on the following grounds:

1. In holding the trial Court's finding to be supported by a conflict in the evidence this Court:

(a) Misconstrued the testimony of Doctor Bostick and inadvertently misstated his testimony in the opinion, and

(b) Erroneously held the testimony of Doctor Bostick that the assured had a cancer in December of 1943 to be contradicted by the testimony of other witnesses who did not even express an opinion when testifying as to whether they then believed the assured had a cancer at the time in question.

2. The Court's holding for all practical purposes vitiates the sound health clause which is admittedly valid when agreed to by the parties to an insurance contract.

In support of this application for a rehearing the appellant calls the following matters to the Court's attention:

The question is not whether there was an actionable misrepresentation as to sound health, but whether the condition precedent of sound health at the date of the delivery of the policy was met as a matter of substantive fact; the burden being upon the appellee to establish such fact.* This was the appellant's contention and the Court has not cited any cases to the contrary, nor expressed any contrary doctrine. Its decision is premised entirely on the assertion that there was a conflict on the evidence on this question, justifying a finding in the appellee's favor.

The appellant not only contends that there was no such conflict, but it respectfully contends that the

**Person v. Aetna Life Ins. Co.* (CCA 8), 32 F. (2d) 459;
Scharlach v. Pacific Mutual Life Ins. Co. (CCA 5), 16 F. (2d) 245, and numerous other cases cited in footnote to page 8 of appellant's original brief.

Court in so holding inadvertently misstated the evidence.

The insured died within four months of the date of the delivery of the policy. He died from cancer. The statement of the matters which the Court held justified a finding that he did not have cancer four months before his death was in the next to last paragraph of the opinion. These matters were as follows:

1. "The doctor who examined the insured for the insurance company testified that * * * so far as he could determine the insured was in sound health at the time of the examination for insurance."

This examination took place on November 13, 1943. Admittedly the insured had a cancer* at some time thereafter, even if, as appellee contends, he did not have it then. The question was, when did it develop. The testimony of this witness did not even purport to suggest that the insured did not have cancer by December 4, 1943. Furthermore, the witness did not testify that in the light of the autopsy and subsequent admitted developments his present opinion was that the insured did not have cancer on November 13.

He merely stated that he did not discover the cancer at that time. It is well known that cancer is not discoverable from the moment it exists. It is, of course, a progressive disease. Where admittedly the insured had a cancer not long after the delivery of the policy, the fact that at some earlier date a doctor had not been able to discover it is not affirmative evidence to

*Six inches in size by April 2, 1944. (R. 78.)

justify a finding against positive testimony based on an autopsy that the cancer in fact existed.

The Court will not sustain a finding on a mere scintilla of evidence, if it can be said that this testimony as to November 13 constituted as much as a scintilla. The case is almost exactly like *Scharlach v. Pacific Mutual Life Ins. Co.* (CCA 5), 16 F. (2d) 245, cited in appellant's original brief, page 8. In that case the policy was delivered May 12, 1923. Physicians of his own who had examined him in March and April testified that he was anaemic, but that they found no evidence of cancer. He died July 26 of cancer. Physicians called by the Company testified from the autopsy that the cancer existed at the time of the delivery of the policy.

The beneficiary, as in this case, called the physician who had examined the insured on behalf of the Company for his insurance. He testified that so far as he had determined at the time, the insured was in sound health, and not suffering from any disease. There was also testimony, as in the case at bar, later to be referred to, of lay witnesses, that the insured appeared to be in good health when the policy was delivered. In holding that a verdict was properly directed for the company the Court said, at pages 247-8:

“To say the least, it is questionable whether there was the slightest inconsistency between the evidence to the effect that the deceased was not in good health when the policies were delivered and the evidence relied on by the plaintiff in error. * * * A cancer disclosed by an operation may not be evidence sufficient to support a find-

ing as to how long it had existed, and at the same time be conclusive proof that it had been in existence several months. There was no material conflict between the other testimony relied on by the plaintiff in error and that to the effect that deceased was not in good health on May 12th, when the policies were delivered. * * *

“Where the disease is one the existence of which at a given stage of it is not discoverable, even by a skilled physician, except by ascertaining existing symptoms and making an examination of the blood of the person in question, a finding by a physician, based on such an examination, that that person has such disease, *cannot well be said to be put in issue or impeached by a finding of the absence of disease by another physician, who made no such examination, and from whom the symptoms suggesting such examination were concealed*, or by testimony, based only on observation of such person’s outward appearance, that he then seemed to be in good health. Obviously such evidence lacks probative value, where the question is whether a person has or is free from a disease or ailment which is not discoverable by merely observing the outward appearance of that person. * * *

“* * * But, assuming that the evidence relied on by the plaintiff in error, if standing by itself, was sufficient to support a finding that the deceased was in good health when the policies were delivered, it was not such evidence as reasonably could be given the effect of rebutting or contradicting the evidence which showed that the deceased then had a serious internal disease, the existence of which was not disclosed by his outward appearance.” (Italics supplied.)

In connection with the last quoted sentence, the Court will note particularly the testimony by the instant witness (R. 54) that his examination was not conclusive and that the value of his opinion was dependent on other factors.

“Q. At the time you made this examination Theodore W. Quandt, the deceased, was in sound health?

A. As far as I could make out he was, yes.

Q. You are a physician, and you would have discovered it, wouldn't you?

A. You have to go a lot on history, because from the questions you ask he could have it without knowing it, and he could have it without knowing it if he did not give you symptoms that would lead you to think that he had.”

Mr. Quandt did not disclose the indigestion attacks to this witness, Dr. Cox (R. 22)* and the clear inference from his testimony was that the witness may have been in error on his diagnosis.

And again, in connection with the italicized sentence from the above opinion, the same witness testified, at page 52:

“Q. Did you make any examination when you made your examination for life insurance to ascertain if the patient is suffering from pain?

A. Well, as to the abdomen, we feel over the abdomen. The history, a good deal of it has to be what he tells you.

Q. Did you make any examination of the blood?

*Which the evidence showed had existed for several months (R. 70), a fact regarded as important by appellant's doctor. (See point 3, *infra*.)

A. No, we don't do that.

Q. What would be the usual examination that might be made to discover whether a patient was suffering from cancer?

A. Well, one of the first things we would have would be an X-ray, or make a microscopic examination, but you do not go through that unless you have symptoms."

Thus it appears that the insured did not report his symptoms, and the doctor *did not make* the examination which he stated was necessary to rule out the question of cancer. Of what substantial value, then, is his testimony? The case is on all fours with the *Scharlach* decision. The Court did not, however, discuss either that case, or any other case cited by the appellant, in its opinion.

2. "Another doctor who had examined the insured about the same time testified the insured was in perfect health * * * in sound health."

This was Dr. Mitchell. He examined the insured on November 18, 1943. What was said about the previous witness applies equally to him. Dr. Mitchell not only did not state that his *present* opinion was that the insured did not, in the light of later events, have cancer at the time of his examination—much less 21½ weeks later—but he was very careful to qualify his opinion. He said (R. 61), "Well, *as far as I was aware at that time* Mr. Quandt was in perfect health." (Italics supplied.) This was not, as the Court stated in its decision testimony "that the insured *was* in perfect health" on November 18. The witness was not asked that question. It was only testimony that

so far as he discovered *at that time* the insured was in such health—two very different things. The appellee put both of these witnesses on, and did not ask either of them for their present opinion, but only for their past opinion. That is not the way to satisfy the burden of proof, or to contradict positive autopsy findings, as the Court held in the *Scharlach* case.

3. “The doctor who performed the autopsy, as a witness for the appellant, on direct examination declared that the cancer was at least a year old at the time of the insured’s death, *but* on cross-examination *qualified* the statement thus, ‘* * * I would prefer to say that he had probably had it for six months or even longer, but that can’t be said positively.’ ” (Italics supplied.)

With all proper respect, the Court has misunderstood the witness’ testimony. The quoted statement appears at page 85 of the transcript. For the two previous pages, and right to and including the question to which this is an answer, *and immediately beyond*, the discussion relates not to when the insured developed the *cancer*, but when the *symptom* of nausea commenced, or should have commenced. It is that symptom to which the quoted answer relates, and not to the commencement of the cancer itself. The Court’s construction and application of this individual sentence is both inaccurate and unfair. It is particularly so in the light of the witness’ testimony two pages later (R. 87) removing any possible ambiguity.

“Q. Doctor, is there any question in your mind, basing your answer on your experience and learning, that this cancer existed in this man

in November, 1943, approximately five months prior to his death?

A. Oh, absolutely no doubt. There is not the slightest possibility that there was no cancer there. There is, positively."

A conflict in the testimony should not be said to exist by misconstruing testimony. The appellant is sure that the Court did not do this intentionally, but since this was the *only* witness who testified as to a final opinion on the question of when the cancer commenced, as distinguished from an initial preliminary diagnosis, it was of course error by this Court of the most prejudicial character.

4. "There was other conflicting testimony."

The only other testimony which the appellee claimed in its brief to be conflicting was the testimony of the agent that the insured appeared to be in sound health. This was not, coming from a layman, even a scintilla of evidence that he did not have cancer.

Greenbaum v. Columbian National Life Ins. Co., 62 F. (2d) 56.

The appellant respectfully submits that not only was there no conflict in the evidence, but the Court's opinion saying there was one overstated the testimony of one witness and misstated the testimony of another on the very matter at issue.

Finally, the appellant respectfully requests reconsideration of the general question and the effect of the present decision of this Court. The purpose of the sound health clause, a clause uniformly approved by the Courts and one which the Company has a right to

expect to be enforced, is that the insurer will not be liable, in return for a premium of \$382.05, to pay less than four months from the date of the delivery of the policy the total amount of \$15,000 for a loss caused by disease if it had already commenced when the policy was delivered. Obviously in no case does the insured *appear* to have the disease when the insured is examined and the policy approved or the policy would not have been delivered in the first place. If the Court is going to support a finding against the Company in the face of positive testimony based upon demonstrable physical facts disclosed by the autopsy, simply on evidence that the insured appeared to a physician or physicians to be in good health the week that he was examined for the policy, then the entire purpose of the sound health clause is destroyed. Of course the insured appeared to be in sound health then or, as above stated, the policy would not have been approved. The agreement in the sound health clause was not whether he *appeared* to be in sound health to the insured's physician (or to some other physician for that matter, the question being the same), but whether he was *in fact* in sound health.

As previously stated, neither of the appellee's witnesses testified that in the light of subsequent evidence he was *in fact in sound health at the time of the delivery of the policy*, but merely that he had appeared so to them some two or three weeks before. If the sound health agreement is to mean anything at all, the decision of the court that the burden of proof as to this condition precedent has been satisfied by such evidence reduces its meaning to an imperceptible min-

imum. It is allowing the appellee to meet the burden of proof merely by a showing of what was known to the Company to have existed anyway, and this in the face of a positive showing by the autopsy that the insured had a six inch cancer four months later. The appellant's expert, the official deputy surgeon for the coroner of the City and County of San Francisco, who had performed over 3000 autopsies, testified that this cancer had reached a stage of development showing it had been in existence for twelve months. *Not a single expert was called by the appellee to give an opinion contradicting that positive assertion.* The appellant respectfully submits that this Court erred in stating in its opinion that this witness qualified or contradicted himself, and erred in disregarding well-settled principles in holding that the fact that some weeks before the delivery of the policy physicians failed to find the cancer created a substantial contradictory issue of fact satisfying the burden of proof that no cancer existed when the policy was delivered.

The record is absolutely bare of any testimony that the insured was in sound health on December 4, 1943. This void is not to be filled by any "presumption" that he continued to be in the same condition he was in on November 13 or 18, in the face of the undisputed testimony that by April 2 a six inch cancer existed. *Even if he had no cancer in November, he had one before April.* The burden was on the appellee to show that he did not have it in December. For that proposition there was no evidence whatever.

The appellant respectfully requests the reconsideration of the present opinion and a reversal of the decision below.

Dated, San Francisco,
May 20, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL FOR APPELLANT.

It is hereby certified that this petition for a rehearing is made in good faith; that in our judgment it is well founded and that it is not interposed for delay.

Dated, San Francisco,
May 20, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,
*Attorneys for Appellant
and Petitioner.*



No. 11159

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,
and

BEATRICE M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petitions to Review Decisions of the Tax Court
of the United States

FILED

NOV 30 1945

Rotary Colorprint, 661 Howard Street, San Francisco

PAUL P. O'BRIEN,
CLERK

No. 11159

United States
Circuit Court of Appeals

For the Ninth Circuit.

A. M. STANDISH,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

R. CLARENCE OGDEN, ESQ.,

LOUIS JANIN, ESQ.,

For Comm'r:

T. M. MATHER, ESQ.,

R. C. WHITLEY, ESQ.,

Docket No. 3949

A. M. STANDISH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1944

Feb. 2—Petition received and filed. Taxpayer notified. Fee paid.

“ 4—Copy of petition served on General Counsel.

“ 26—Answer filed by General Counsel.

“ 26—Request for hearing in San Francisco filed by General Counsel.

Mar. 6—Notice issued placing proceeding on San Francisco, Calif. calendar. Service of answer and request made.

Aug. 10—Hearing set Sept. 18, 1944 at San Francisco, Calif.

Sep. 19—Hearing had before Judge Van Fossan on the merits. Submitted. Ordered consolidated with Docket 3950. Briefs due 10/19/44. No replies.

Oct. 14—Transcript of hearing of 9/19/44 filed.

1944

Oct. 19—Brief filed by taxpayer. 10/31/44 copy served.

“ 25—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 10/25/44 granted and served 10/31/44.

1945

Mar. 19—Findings of fact and opinion rendered, Van Fossan J. Decision will be entered under Rule 50. 3/20/45 copy served.

Apr. 17—Computation of deficiency filed by General Counsel.

“ 19—Hearing set 6/6/45 on settlement.

May 1—Hearing changed to 6/20/45 on settlement.

Jun. 20—Hearing had before Judge Van Fossan on settlement. Respondent's computation filed.

“ 20—Decision entered, Van Fossan J. Div. 9.

Sep. 17—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

“ 17—Affidavit of service by mail of petition for review filed.

“ 26—Certified copy of an order from 9th Circuit consolidating proceedings for purpose of single record filed.

“ 27—Statement of points filed by taxpayer with affidavit of service by mail attached.

“ 27—Designation of contents of record on appeal filed by taxpayer with affidavit of service by mail attached. [1*]

APPEARANCES

For Taxpayer:

R. CLARENCE OGDEN, ESQ.,

LOUIS JANIN, ESQ.,

For Comm'r:

T. M. MATHER, ESQ.,

R. C. WHITLEY, ESQ.,

Docket No. 3950

BEATRICE M. STANDISH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1944

Feb. 2—Petition received and filed. Taxpayer notified. Fee paid.

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May 1—Hearing changed to 6/20/45 on settlement.

Jun. 20—Hearing had before Judge Van Fossan on settlement. Respondent's computation filed.

“ 20—Decision entered, Van Fossan J. Div. 9.

Sep. 17—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

“ 17—Affidavit of service by mail of petition for review filed.

1945

Sept. 26—Certified copy of order from 9th Circuit consolidating proceedings for purpose of single record filed.

“ 27—Statement of points filed by taxpayer with affidavit of service by mail attached.

“ 27—Designation of contents of record on appeal filed by taxpayer with affidavit of service by mail attached. [2]

The Tax Court of the United States

Docket No. 3949

A. M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IRA:90-D WHL) dated November 8, 1943, and as a basis of his proceedings alleges as follows:

1. The petitioner is an individual with his residence at Milpitas, California. The return for the period herein involved was filed with the Collector for the First District of California.

2. The notice of deficiency, (copy of which is attached hereto and marked Exhibit "A") was mailed to petitioner on November 8, 1943.

3. The taxes and penalties in controversy are income taxes and five (5) per cent penalties thereon in the following amounts: [3]

Year	Deficiency	5% Penalty
1940	\$ 135.05	\$ 6.80
1941	2,055.37	102.77
	<hr/>	<hr/>
Total	\$2,191.42	\$109.57

4. The determination of deficiencies set forth in said notice is based upon the following errors, all of which relate to the increase in distributable income of the partnership of A. M. Standish and Beatrice M. Standish for the years in question:

A. For the year 1940 the Commissioner erred in determining that said partnership was entitled to "proceeds in liquidation" of \$1,975.31 or in any amount in excess of \$760.00 as a return on a loan made to Yorkville Lumber Company on June 22, 1943 in the amount of \$5,000.00.

B. For the years 1940 and 1941 the Commissioner erred in determining that a penalty should be imposed upon your petitioner by reason of negligence or intentional disregard of rules and regulations, or otherwise. No part of the deficiency being due by reason of such errors, but only by reason of deductions disallowed.

C. For the year 1941 the Commissioner erred

in increasing petitioner's income by \$5,256.46 by disallowing the loss of \$10,512.92 claimed as a deduction on the partnership return of petitioner and his wife, Beatrice M. Standish, with respect to the loss of certain timber properties in the State of Oregon [4] from abandonment and nonpayment of taxes, and particularly erred in determining that "any loss sustained is deductible by the estate of Miles Standish, deceased, or the trust created by him, either prior to death or in his will". The last mentioned determination by the Commissioner is erroneous because the "trust" to which this property was "conveyed" was completely void, and because no probate proceedings having ever been commenced in the State of Oregon, the timber property located in that state, and the title thereto, passed to, and was vested in, A. M. Standish immediately upon the death of Miles Standish, and the loss sustained (now believed to be \$7,471.80, rather than \$10,512.92 claimed on the return) was sustained by the partnership as the successor in interest to said timber properties of the said Allan M. Standish, rather than by any estate or trust of, or created by Miles Standish.

5. The facts upon which petitioner relies in support of his proceedings are as follows:

(a) In 1934 the partnership of Allan M. Standish and Beatrice M. Standish (petitioner and his wife) made a loan of \$5,000.00 to the Yorkville Lumber Company. Security was later obtained for this loan, together with other loans. In March of

1940 said security was sold and the partnership advised that its share of the proceeds of \$1,975.31 would be \$760.00. Respondent has applied all of the proceeds of sale, rather than the partnership's share thereof, as an offset to the debt. [5]

(b) Petitioner is informed and believes and therefore alleges the fact to be that no part of the deficiency for either 1940 or 1941 is due to errors of bookkeeping or negligence but that said deficiencies result entirely from deductions disallowed, principally to the partnership of Allan M. & Beatrice Standish, and to increase the income of said partnership.

(c) Miles Standish died a resident of California on June 22, 1932, and at the time of his death was the owner in fee simple of an undivided one-half interest in certain real property located in Coos and Douglas Counties in the State of Oregon. As a consequence of such death said property vested in Allan M. Standish, the son of decedent, and he came into possession of the same on June 22, 1932, holding one-half of said interest for his own benefit and one-quarter thereof for each of the two minor children of himself and wife. At such time the property had a value of \$19,942.25 for the one-half interest owned by Miles Standish as finally determined by the Commissioner in Estate Tax Proceedings on his estate.

(d) Thereafter Allan M. Standish by written agreement with Beatrice M. Standish, transferred his one-fourth interest in said lands to the part-

nership of Allan M. & Beatrice M. Standish and said partners became the owners of, and entered into possession of, the said one-fourth interest in said lands. Thereafter the taxing authorities of said counties imposed such exorbitant taxes on said lands, a lien thereon, that payment thereof did not appear to be [6] justified and in 1941 petitioner and said Beatrice M. Standish abandoned said lands, permitting them to be finally sold in said year for such taxes. The loss sustained on said one-quarter interest was reduced by prior sales of portions of said lands, interests therein, or timber thereon, to \$7,471.80, as petitioner is informed and believes.

(c) Petitioner is informed and believes and therefore alleges that said loss is deductible, one-half on the return of himself for 1941, and one-half on the return of said Beatrice M. Standish for said year, and that the said loss is not that of any estate or trust.

Wherefore, petitioner prays the Court to hear the proceeding, to redetermine the deficiencies in accordance with this petition, and to grant such other and further relief as may be just, meet and proper in the premises.

R. CLARENCE OGDEN

LOUIS JANIN

Counsel for Petitioner [7]

AFFIDAVIT OF VERIFICATION

State of California,

City and County of San Francisco—ss.

Allan M. Standish, being first duly sworn, deposes and says:

That he is the petitioner named in and who makes the foregoing petition; that he has read the same and knows the facts stated therein to be true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters that he believes it to be true.

ALLAN M. STANDISH

Subscribed and sworn to before me this 31st day of January, 1944.

[Seal]

LULU P. LOVELAND

Notary Public in and for the City and County of San Francisco, State of California. [8]

Treasury Department

Internal Revenue Service

San Francisco, Calif.

74 New Montgomery Street

Nov. 8, 1943

Office of Internal Revenue

Agent in Charge

San Francisco Division

IRA:90-D WHL

Mr. A. M. Standish,

Milpitas, California

Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1940 and December 31, 1941 discloses

a deficiency of \$2,191.42 and penalties of \$109.57 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies and penalties mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States for a redetermination of the deficiency and penalties.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Seventh Floor, 74 New Montgomery Street, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency and penalties, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

ROBERT E. HANNEGAN,
Commissioner

By F. M. HARLESS

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of waiver [9]

STATEMENT

San Francisco

IRA :90-D

WHL

Mr. A. M. Standish,
Milpitas, California

Tax Liability for the Taxable Years Ended December 31, 1940 and December 31, 1941

Year	Income Tax Liability	Assessed	Deficiency	5% Penalty
1940	\$ 298.85	\$ 162.80	\$ 136.05	\$ 6.80
1941	3,035.27	979.90	2,055.37	102.77
Totals	<u>\$3,334.12</u>	<u>\$1,142.70</u>	<u>\$2,191.42</u>	<u>\$109.57</u>

In making this determination of your income tax liability, careful consideration has been given to your protest filed July 15, 1943 and to the statements made at the conference held on August 2, 1943.

There is added 5 per cent of the total amount of the deficiency under the provisions of section 293 (a) of the Internal Revenue Code, due to negligence or intentional disregard to rules and regulations.

Adjustments to Net Income

Year: 1940

Net income as disclosed by return.....		\$4,455.64
Unallowable deductions and additional income:		
(a) Partnership income.....	\$1,429.31	
(b) Rental income	116.66	\$1,545.97
Net income adjusted		<u><u>\$6,001.61</u></u>

Explanation of Adjustments

(a) Your distributive share of the net income of the partnership of A. M. and B. M. Standish is increased by \$1,429.31 due to the following adjustment of partnership income: [10]

Net income per form 1065 filed by the partnership	\$6,346.52
Increase:	
1. Loss from partnership of Standish and Hickey disallowed..\$ 668.31	
2. Fiduciary loss disallowed..... 200.00	
3. Bad debt disallowed..... 1,215.31	
4. Damage to orchard disallowed..... 935.00	3,018.62
Total	<u>\$9,365.14</u>
Decrease:	
5. Depreciation allowed.....	<u>160.00</u>
Partnership net income as adjusted.....	<u>\$9,205.14</u>
Your 50 per cent distributive share.....	\$4,602.57
Amount reported on return.....	<u>3,173.26</u>
Increase in partnership income.....	<u><u>\$1,429.31</u></u>

1. The loss of \$668.31 claimed as resulting from the operation of the partnership of Standish and Hickey is disallowed for the reason that the interest in the partnership is held by the Estate of Miles Standish, deceased.

2. The deduction of \$200.00 representing a loss sustained by the Estate of Miles Standish, deceased, is disallowed since such loss is not distributable.

3. Bad debt deduction claimed on a loan made

to Yorkville Lumber Company is reduced by \$1,215.31 as follows:

Loan made June 22, 1934.....	\$5,000.00
Proceeds in liquidation	1,975.31
<hr/>	
Bad debt worthless in 1940.....	\$3,024.69
Amount claimed on the return	4,240.00
<hr/>	
Amount disallowed	\$1,235.31
<hr/>	

4. Deduction of \$935.00 for damage to orchard from blight is disallowed for lack of substantiation.

5. Additional depreciation of \$160.00 is allowed on buildings, which amount is computed as follows:

Basis for depreciation 1-1-1935.....	\$4,000.00
Less: Depreciation allowed or allowable prior to 1-1-1940	960.00
<hr/>	
Basis to be recovered 1-1-1940.....	\$3,040.00
<hr/>	
Depreciation based on remaining life of 19 years	\$ 160.00
<hr/>	

(b) Income from residential property which was converted to rental purposes in 1940 is increased by \$116.66 due to the adjustment of depreciation shown below:

Basis for depreciation of building.....	\$10,000.00
<hr/>	
Depreciation at 5 per cent for 7 months.....	\$ 291.67
Depreciation claimed	350.00
<hr/>	
Amount disallowed	58.33

Depreciation on furniture disallowed for lack of substantiation of basis.....	\$ 175.00
Total disallowed	\$ 233.33
Your one-half share	\$ 116.66

Computation of Tax
Year: 1940

Net income adjusted	\$6,001.61
Less: Personal exemption	455.64
Balance (surtax net income).....	\$5,545.97
Less: Earned income credit (10 per cent of \$3,000)....	300.00
Net income subject to normal tax.....	\$5,245.97
Normal tax at 4 per cent on \$5,245.97.....	\$ 209.84
Surtax on \$5,545.97.....	61.84
Total	\$ 271.68
Defense tax @ 10 per cent	27.17
Correct income tax liability.....	\$ 298.85
Income tax assessed:	
Original, account No. 267922—First Calif. District	162.80
Deficiency of income tax.....	\$ 136.05
5% negligence penalty (5% of \$136.05).....	\$ 6.80

Adjustments to Net Income
Year: 1941

Net income as disclosed by return.....	\$ 7,665.26
Unallowable deductions and additional income:	
(a) Partnership income	7,043.49
Net income adjusted	\$14,708.75

Explanation of Adjustments

(a) Your distributive share of the net income of the partnership of A. M. and B. M. Standish is increased by \$7,043.49 as shown below:

Net income per form 1065 filed by the partnership		\$19,011.66
Add:		
1. Increase in gross profit		
from business	\$ 839.76	
2. Fiduciary loss	484.95	
3. Fiduciary loss	10,512.92	
4. Income from rents.....	1,185.35	
5. Damage to orchard	824.00	
6. Depreciation	240.00	\$14,086.98
		<hr/>
Partnership net income adjusted..		\$33,098.64
		<hr/>
Your 50 per cent distributive share		\$16,549.32
Amount reported on your return		9,505.83
		<hr/>
Increase in partnership income....		\$ 7,043.49
		<hr/> <hr/>

1. Expenses deducted in computing the gross profit from business include an expenditure of \$839.76 for repairs to your residence. This amount is disallowed because it is a personal expense.

2. Deduction claimed for \$484.95 representing the net loss of the Estate of Miles Standish, Deceased, is disallowed because such losses are not distributable.

3. The loss of \$10,512.92 claimed as sustained by the Miles Standish Trust upon the loss of certain timber property because of failure to pay taxes owing to the State of Oregon is disallowed on the ground that any loss sustained is deductible by the

Estate of Miles Standish, Deceased, or trusts created by him, either prior to death or in his will.

4. Rental income is increased in the amount of \$1,185.35 received during the year 1941 but not reported in the partnership return.

5. Deduction of \$824.00 for damage to orchard from blight is disallowed for lack of substantiation.

6. Depreciation is reduced by \$240.00 based upon the following adjustment:

Depreciation on rental property:

Per return	\$ 900.00
As adjusted:	
Depreciation on \$10,000.00 at 5 per cent.....	500.00
	<hr/>
Disallowed	\$ 400.00
Less: Additional depreciation allowed on buildings. (Depreciation on \$3,040.00 on basis of 19 year life).....	160.00
	<hr/>
Net disallowance	\$ 240.00
	<hr/> <hr/>

Computation of Alternative Tax (Section 117 (c)—Internal Revenue Code)

Year: 1941

Net income	\$14,708.75
Plus: Net long-term capital loss.....	1,749.28
	<hr/>
Ordinary net income	\$16,458.03
Less: Personal exemption	750.00
	<hr/>
Balance (surtax net income).....	\$15,708.03
Less: Earned income credit.....	330.99
	<hr/>
Net income subject to normal tax.....	\$15,377.04
	<hr/>

Normal tax at 4 per cent on \$15,377.04.....	\$ 615.08
Surtax on 15,708.03.....	2,946.57
Partial tax	\$ 3,561.65
Minus: 30 per cent of net long-term loss.....	524.78
Alternative tax	\$ 3,036.87

Computation of Tax

Year: 1941

Net income adjusted.....	\$14,708.75
Less: Personal exemption	750.00
Balance (surtax net income).....	\$13,958.75
Less: Earned income credit (10 per cent of \$3,309.86).....	330.99
Net income subject to normal tax.....	\$13,627.76
Normal tax at 4 per cent on \$13,627.76.....	\$ 545.11
Surtax on 13,958.75.....	2,388.04
Total	\$ 2,933.15
Alternative tax in case of net long-term capital loss....	\$ 3,036.87
Less: Income tax paid at the source.....	1.60
Correct income tax liability.....	\$ 3,035.27
Income tax assessed: Original, account No. 357529-First Calif. District	979.90
Deficiency of income tax.....	\$ 2,055.37
5 per cent negligence penalty (5% of \$2,055.37).....	\$ 102.77

[Endorsed]: T.C.U.S. Filed Feb. 2, 1944. [15]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. A to C, inclusive. Denies that the Commissioner erred in the determination of the deficiency, as alleged in subparagraphs A to C, inclusive, of paragraph 4 of the petition.
5. (a) Admits that in 1934 the partnership of Allan M. Standish and Beatrice M. Standish (petitioner and his wife) made a loan of [16] \$5,000.00 to the Yorkville Lumber Company, and that security was later obtained for this loan, together with other loans, but denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.
(b) Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits the allegations contained in subparagraph (c) of paragraph 5 of the petition, except it is denied that as a consequence of such death said property vested in Allan M. Standish, the son of decedent, and he came into possession of the same on June 22, 1932, holding one-half of said interest for his own benefit and one-quarter thereof for each of the two minor children of himself and wife.

(d) and (e) Denies the allegations contained in subparagraphs (d) and (e) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL PMM

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel,

T. M. MATHER,

Special Attorney,

Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Feb. 26, 1944. [17]

The Tax Court of the United States

Docket No. 3950

BEATRICE M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IRA:90-D WHL) dated November 8, 1943, and as a basis of her proceedings, alleges as follows:

1. The petitioner is an individual with her residence at Milpitas, California. The return for the period involved was filed with the Collector of the First District of California.

2. The notice of deficiency (copy of which is attached hereto and marked Exhibit "A") was mailed to petitioner on November 8, 1943.

3. The taxes and penalties in controversy are income taxes and five (5) per cent penalties thereon in the following amounts: [18]

Year	Deficiency	5% Penalty
1940	\$ 135.03	\$ 6.80
1941	2,055.37	102.77
<hr/>		<hr/>
Total	\$2,191.40	\$109.57

4. The determination of deficiencies set forth in said notice is based upon the following errors, all

of which relate to the increase in distributable income of the partnership of A. M. Standish and Beatrice M. Standish for the years in question:

A. For the year 1940 the Commissioner erred in determining that said partnership was entitled to "proceeds in liquidation" of \$1,975.31 or in any amount in excess of \$760.00 as a return on a loan made to Yorkville Lumber Company on June 22, 1943 in the amount of \$5,000.00.

B. For the years 1940 and 1941 the Commissioner erred in determining that a penalty should be imposed upon your petitioner by reason of negligence or intentional disregard of rules and regulations, or otherwise. No part of the deficiency being due by reason of such errors, but only by reason of deductions disallowed.

C. For the year 1941 the Commissioner erred in increasing petitioner's income by \$5,256.46 by disallowing the loss of \$10,512.92 claimed as a deduction on the partnership return of petitioner and her husband, Allan M. Standish, with respect to the loss of certain timber properties in the State of Oregon [19] from abandonment and nonpayment of taxes, and particularly erred in determining that "any loss sustained is deductible by the estate of Miles Standish, deceased, or the trust created by him, either prior to death or in his will". The last mentioned determination by the Commissioner is erroneous because the "trust" to which this property was "conveyed" was completely void, and because, no probate proceedings having ever been

commenced in the State of Oregon, the timber property located in that state, and the title thereto, passed to, and was vested in, A. M. Standish immediately upon the death of Miles Standish, and the loss sustained (now believed to be \$7,471.80, rather than \$10,512.92 claimed on the return) was sustained by the partnership as the successor in interest to said timber properties of the said Allan M. Standish, rather than by any estate or trust of, or created by Miles Standish.

5. The facts upon which petitioner relies in support of her proceeding are as follows:

(a) In 1934 the partnership of Allan M. Standish and Beatrice M. Standish (petitioner and her husband) made a loan of \$5,000.00 to the Yorkville Lumber Company. Security was later obtained for this loan, together with other loans. In March of 1940 said security was sold and the partnership advised that its share of the proceeds of \$1,975.31 would be \$760.00. Respondent has applied all of the proceeds of sale, rather than the partnership's share thereof, as an offset to the debt. [20]

(b) Petitioner is informed and believes and therefore alleges the fact to be that no part of the deficiency for either 1940 or 1941 is due to errors of bookkeeping or negligence but that said deficiencies result entirely from deductions disallowed, principally to the partnership of Allan M. & Beatrice Standish, and to increase the income of said partnership.

(c) Miles Standish died a resident of California

on June 22, 1932, and at the time of his death was the owner in fee simple of an undivided one-half interest in certain real property located in Coos and Douglas Counties in the State of Oregon. As a consequence of such death said property vested in Allan M. Standish, the son of decedent, and he came into possession of the same on June 22, 1932, holding one-half of said interest for his own benefit and one-quarter thereof for each of the two minor children of himself and petitioner. At such time the property had a value of \$19,942.25 for the one-half interest owned by Miles Standish as finally determined by the Commissioner in Estate Tax Proceedings on his estate.

(d) Thereafter Allan M. Standish by written agreement with petitioner transferred his one-fourth interest in said lands to the partnership of Allan M. & Beatrice M. Standish and said partners became the owners of, and entered into possession of, the said one-fourth interest in said lands. Thereafter the taxing authorities of said counties imposed such exorbitant taxes on said lands, a lien thereon, that payment thereof did not appear to be justified [21] and in 1941 petitioner and said Allan M. Standish abandoned said lands, permitting them to be finally sold in said year for such taxes. The loss sustained on said one-quarter interest was reduced by prior sales of portions of said lands, interests therein, or timber thereon, to \$7,471.80, as petitioner is informed and believes.

(e) Petitioner is informed and believes and therefore alleges that said loss is deductible, one-

half on the return of herself for 1941, and one-half on the return of said Allan M. Standish for said year, and that the said loss is not that of any estate or trust.

Wherefore, petitioner prays the Court to hear the proceeding, to redetermine the deficiencies in accordance with this petition, and to grant such other and further relief as may be just, meet and proper in the premises.

R. CLARENCE OGDEN

LOUIS JANIN

Counsel for Petitioner [22]

AFFIDAVIT OF VERIFICATION

State of California,

City and County of San Francisco—ss.

Beatrice M. Standish, being first duly sworn, deposes and says:

That she is the petitioner named in and who makes the foregoing petition; that she has read the same and knows the facts stated therein to be true of her own knowledge, except as to those matters therein stated upon information and belief, and as to those matters that she believes it to be true.

BEATRICE M. STANDISH

Subscribed and sworn to before me this 31st day of January, 1944.

[Seal]

LULU P. LOVELAND

Notary Public in and for the City and County of San Francisco, State of California. [23]

EXHIBIT A

Office of
Internal Revenue
Agent in Charge
IRA: 90-D
WHL

Treasury Department
Internal Revenue Service
San Francisco, Calif.
74 New Montgomery Street

Nov. 8, 1943

Mrs. Beatrice M. Standish
Milpitas, California

Madam:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1940 and December 31, 1941 discloses a deficiency of \$2,191.40 and penalties of \$109.57 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency and penalties mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency and penalties.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge,

Seventh Floor, 74 New Montgomery Street, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and penalties, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

ROBERT E. HANNEGAN,

By F. M. HARLESS

Internal Revenue Agent in
Charge

Enclosures:

Statement

Form of waiver

STATEMENT

San Francisco

IRA: 90-D

WHL

Mrs. Beatrice M. Standish,
Milpitas, California.

Tax Liability for the Taxable Years Ended December 31, 1940 and December 31, 1941

Year	Income Tax Liability	Assessed	Deficiency	5% Penalty
1940	\$ 336.12	\$ 200.09	\$ 136.03	\$ 6.80
1941	3,035.27	979.90	2,055.37	102.77
Totals	\$3,371.39	\$1,179.99	\$2,191.40	\$109.57

In making this determination of your income tax liability, careful consideration has been given to your protest dated April 12, 1943 and to the statements made at the conference held on August 2, 1943.

There is added 5 per centum of the total amount of the deficiency under the provisions of section 293 (a) of the Internal Revenue Code, due to negligence or intentional disregard to rules and regulations.

Adjustments to Net Income

Year: 1940

Net income as disclosed by return.....		\$5,968.01
Unallowable deductions and additional income:		
(a) Partnership income	\$1,429.31	
(b) Rental income	116.66	1,545.97
		<hr/>
Net income adjusted		\$7,513.98

Explanation of Adjustments

(a) Your distributive share of the net income of the partnership of A. M. and B. M. Standish is increased by \$1,429.31 due to the following adjustments of partnership income:

Net income per form 1065 filed by the partnership		\$6,346.52
Increase:		
1. Loss from partnership of Standish and Hickey disallowed	\$ 668.31	
2. Fiduciary loss disallowed.....	200.00	
3. Bad debt disallowed.....	1,215.31	
4. Damage to orchard disallowed.....	935.00	3,018.62
		<hr/>
Total		\$9,365.14

Decrease :

5. Depreciation allowed	\$ 160.00
Partnership net income as adjusted.....	\$9,205.14
Your 50 per cent distributive share.....	\$4,602.57
Amount reported on return.....	3,173.26
Increase in partnership income.....	\$1,429.31

1. The loss of \$668.31 claimed as resulting from the operation of the partnership of Standish and Hickey is disallowed for the reason that the interest in the partnership is held by the Estate of Miles Standish, Deceased.

2. The deduction of \$200.00 representing a loss sustained by the Estate of Miles Standish, Deceased, is disallowed since such loss is not distributable.

3. Bad debt deduction claimed on a loan made to Yorkville Lumber Company is reduced by \$1,215.31, as follows:

Loan made June 22, 1934.....	\$5,000.00
Proceeds in liquidation.....	1,975.31
Bad debt worthless in 1940.....	\$3,024.69
Amount claimed on the return.....	4,240.00
Amount disallowed	\$1,235.31

4. Deduction of \$935.00 for damage to orchard from blight is disallowed for lack of substantiation.

Additional depreciation of \$160.00 is allowed on buildings, which amount is computed as follows:

Basis for depreciation 1-1-1935	\$4,000.00
Less: Depreciation allowed or allowable prior to 1-1-1940	960.00
	<hr/>
Basis to be recovered 1-1-1940.....	\$3,040.00
	<hr/>
Depreciation based on remaining life of 19 years.....	\$ 160.00
	<hr/> <hr/>

(b) Income from residential property which was converted to rental purposes in 1940 is increased by \$116.66 due to the adjustment of depreciation as shown below:

Basis for depreciation of building.....	\$10,000.00
Depreciation at 5 per cent for 7 months.....	\$ 291.67
Depreciation claimed	350.00
	<hr/>
Amount disallowed	\$ 58.33
Depreciation on furniture disallowed for lack of substantiation of basis	\$ 175.00
	<hr/>
Total disallowed	\$ 233.33
	<hr/>
Your one-half share	\$ 116.66

Computation of Tax

Year: 1940

Net income adjusted	\$7,513.98
Less: Personal exemption	1,544.36
	<hr/>
Balance (surtax net income).....	\$5,969.62
Less: Earned income credit (10% of \$3,000.00).....	300.00
	<hr/>
Net income subject to normal tax.....	\$5,669.62
	<hr/> <hr/>

Normal tax at 4 per cent on \$5,669.62.....	\$ 226.78
Surtax on \$5,969.62.....	78.78
Total	\$ 305.56
Defense tax @ 10 per cent.....	30.56
Correct income tax liability.....	\$ 336.12
Income tax assessed:	
Original, account No. 267920—First Calif. Dist....	200.09
Deficiency of income tax	\$ 136.03
5% negligence penalty—(5% of \$136.03).....	\$ 6.80

Adjustments to Net Income
Year: 1941

Net income as disclosed by return.....	\$ 7,665.26
Unallowable deductions and additional income:	
(a) Partnership income	7,043.49
Net income adjusted	\$14,708.75

Explanation of Adjustments

(a) Your distributive share of the net income of the partnership of A. M. & B. M. Standish is increased by \$7,043.49 as shown below: [28]

Net income per form 1065 filed by the partnership	\$19,011.66
Add:	
1. Increase in gross profit from busi- ness	\$ 839.76
2. Fiduciary loss	484.95
3. Fiduciary loss	10,512.92
4. Income from rents	1,185.35
5. Damage to orchard	824.00
6. Depreciation	240.00
	14,086.98

Partnership net income adjusted.....	\$33,098.64
Your 50 per cent distributive share.....	\$16,549.32
Amount reported on your return.....	9,505.83
Increase in partnership income.....	\$ 7,043.49

1. Expenses deducted in computing the gross profit from business include an expenditure of \$839.76 for repair to your residence. This amount is disallowed because it is a personal expense.

2. Deduction claimed for \$484.95 representing the net loss of the Estate of Miles Standish, Deceased is disallowed because such losses are not distributable.

3. The loss of \$10,512.92 claimed as sustained by the Miles Standish Trust upon the loss of certain timber property because of failure to pay taxes owing to the State of Oregon is disallowed on the ground that any loss sustained is deductible by the Estate of Miles Standish, Deceased, or trusts created by him, either prior to death or in his will.

4. Rental income is increased in the amount of \$1,185.35 received during the year 1941 but not reported in the partnership return.

5. Deduction of \$824.00 for damage to orchard from blight is disallowed for lack of substantiation.

6. Depreciation is reduced by \$240.00 based upon the following adjustment: [29]

Depreciation on rental property:	
Per return	\$ 900.00
As adjusted	
Depreciation on \$10,000.00 at 5%.....	500.00
	<hr/>
Disallowed	\$ 400.00
Less: Additional depreciation allowed on buildings.	
(Depreciation on \$3,040.00 on basis of 19-year	
life)	160.00
	<hr/>
Net disallowance	\$ 240.00
	<hr/> <hr/>

Computation of Alternative Tax

(Section 117 (c)—Internal Revenue Code)

Year: 1941

Net income	\$14,708.75
Plus: Net long-term capital loss.....	1,749.28
	<hr/>
Ordinary net income	\$16,458.03
Less: Personal exemption	750.00
	<hr/>
Balance (surtax net income).....	\$15,708.03
Less: Earned income credit	330.99
	<hr/>
Net income subject to normal tax.....	\$15,377.04
	<hr/>
Normal tax at 4 per cent on \$15,377.04.....	\$ 615.08
Surtax on 15,708.03.....	2,946.57
	<hr/>
Partial tax	\$ 3,561.65
Minus: 30 per cent of net long-term loss.....	524.78
	<hr/>
Alternative tax	\$ 3,036.87
	<hr/> <hr/>

Computation of Tax

Year: 1941

Net income adjusted	\$14,708.75
Less: Personal exemption	750.00
Balance (surtax net income)	\$13,958.75
Less: Earned income credit (10% of \$3,309.86).....	330.99
Net income subject to normal tax.....	\$13,627.76
Normal tax at 4% on \$13,627.76.....	\$ 545.11
Surtax on 13,958.75.....	2,388.04
Total	\$ 2,933.15
Alternative tax in case of net long-term capital loss.....	\$ 3,036.87
Less: Income tax paid at the source.....	1.60
Correct income tax liability.....	\$ 3,035.27
Income tax assessed:	
Original, account No. 346722—First Calif. Dist.....	979.90
Deficiency of income tax.....	\$ 2,055.37
5% negligence penalty (5% of \$2,055.37).....	\$ 102.77

[Endorsed]: T.C.U.S. Filed Feb. 2, 1944. [31]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. A to C, inclusive. Denies that the Commissioner erred in the determination of the deficiency, as alleged in subparagraphs A to C, inclusive, of paragraph 4 of the petition.

5.(a) Admits that in 1934 the partnership of Allan M. Standish and Beatrice M. Standish (petitioner and her husband) [32] made a loan of \$5,000.00 to the Yorkville Lumber Company and that security was later obtained for this loan, together with other loans, but denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits the allegations contained in subparagraph (c) of paragraph 5 of the petition, except it is denied that as a consequence of such death said property vested in Allan M. Standish, the son of decedent, and he came into possession of the same on June 22, 1932, holding one-half of said interest for his own benefit and one-quarter thereof for each of the two minor children of himself and petitioner.

(d) and (c) Denies the allegations contained in subparagraphs (d) and (c) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL, TMM

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel,

T. M. MATHER,

Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Feb. 26, 1944. [33]

The Tax Court of The United States

4 T. C. No. 119

A. M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BEATRICE M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket Nos. 3949, 3950

Promulgated March 19, 1945

Held, that a certain trust did not violate the rule against perpetuities—there being an immediate vesting in the beneficiaries as at the date of the death of the trustor of interest both in income and corpus.

R. Clarence Ogden, Esq., for the petitioners.

T. M. Mather, Esq., for the respondent.

The respondent determined deficiencies in the petitioners' income taxes and imposed penalties as follows: [34]

Docket

No.	Petitioner	Year	Deficiency	Penalty
3949	A. M. Standish	1940	\$ 136.05	\$ 6.80
	A. M. Standish	1941	2,055.37	102.77
3950	Beatrice M. Standish	1940	136.03	6.80
	Beatrice M. Standish	1941	2,055.37	102.77

The issues are as follows:

- (1) The proper amount of a bad debt due from the Yorkville Lumber Company deductible in 1940;
- (2) The deductibility in 1941 of a loss from the sale of timber properties for delinquent taxes;
- (3) The propriety of a negligence penalty asserted by the respondent.

FINDINGS OF FACT

The petitioners are husband and wife and reside in Milpitas, California. The husband will hereinafter be referred to as the petitioner. They filed their income tax returns for the years 1940 and 1941 with the collector of internal revenue for the first district of California.

The petitioners are partners in the ownership and operation of the property giving rise to the deductions claimed. The partnership was chiefly engaged in the operation of orchards. Its books of account were set up by a public accountant. The petitioner kept the books to the best of his ability. The books for prior years had been examined by the Treasury Department and no complaint has been made against the type of books, the impro-

priety of the method employed or the petitioner's neglect in keeping them.

Miles Standish, father of the petitioner, died on June 22, 1932, a resident of California. At the time of his death, he was the owner [35] in fee simple of an undivided one-half interest in certain real property in Coos County and Douglas County, Oregon, having a value of \$19,462.25 for his half interest, as finally determined by the respondent in estate tax proceedings. The decedent's interest in the Douglas County lands was valued at \$9,201 and in the Coos County lands at \$10,261.25. The Coos County holdings and their respective values were 520 acres of agricultural land, \$14,560; 400 acres of timber land, \$440; 1,000 acres of cut-over lands suitable for reforestation, \$1,000; and 9,045 M feet of Douglas fir timber, \$4,522.50, or a total of \$20,522.50, the decedent's one-half being \$10,261.25. The Douglas County property was all timber land.

In 1941 all the Douglas County land was sold for the nonpayment of taxes and the tracts of the Coos County land suitable for agriculture and the timber land were also sold at tax sales, leaving unsold only the reforestation land. Prior to the tax sale, the petitioner and Henry B. Hickey, the owner of the other undivided one-half interest, had sold lands and timber therefrom for \$3,521.95.

The loss to the Standish interests was \$17,201.28, composed of loss on the Douglas County tax sale (\$9,201) and loss on the Coos County lands (\$8,000.28), computed by subtracting one-half of the value of the reforestation land unsold (\$500)

and one-half of the amount realized from the sale of timber and lands (\$1,760.97) from the original value of the decedent's one-half interest (\$10,-261.25).

On June 17, 1932, Miles Standish executed a deed of trust whose corpus included the Coos County and Douglas County lands. The trust directed that the corpus should be held by the trustees who were to pay the net income therefrom to the grantor during his lifetime, and upon [36] his death, to the petitioner, his wife and two children in designated proportions. The trust instrument contained the following pertinent provisions:

This division of the net proceeds and income from the said property shall continue until the youngest grandchild shall have attained the age of thirty (30) years, when the Trustees shall convey to the Beneficiaries then living, all of the property then remaining in this trust, in such proportion as their respective interests are indicated by the percentages upon which the income has been paid to them, and the trust shall cease.

* * * *

Eighth: In the event that I have any additional grandchild or grandchildren living at the time of my death, the shares of Patricia and Beatrice Standish shall be proportionately reduced so that such additional grandchild or grandchildren shall share equally with them.

Ninth: In the event that any grandchild shall die prior to the time that the respective beneficial interest due said grandchild shall become payable in whole or part as herein provided, then the in-

vested beneficial interest due said grandchild shall revert as follows:

1. If said deceased grandchild shall leave lawful heir of his or her body then such legal heir or heirs shall become the beneficiary in the place and stead of his or her parent by right of representation.

2. In the event any deceased grandchild leaves no legal heirs, then the beneficial interest to which said grandchild would otherwise be entitled shall revert to the equal benefit of the surviving grandchildren, the legal issue of any deceased grandchild to take by representation.

3. In the event that all of said grandchildren die without legal issue prior to the vesting of all of said trust estate, so much as remains shall be paid or delivered to any heirs of the first party under the law of succession as the same exists at the date of this instrument.

In 1941 a fiduciary return was filed for the Miles Standish Trust in which a loss of \$14,943.60 was reported from the sale of the Coos County and Douglas County lands. [37]

Miles Standish left a will dated January 7, 1930, which established a testamentary trust. The will made specific bequests and then contained the following paragraph:

Fourth: I give, devise and bequeath to my said son, Allan M. Standish, all of the residue of my property and estate of every kind and nature, and wherever situate, of which I may die seized or

possessed or in which I may have an interest, in trust, nevertheless, for the following uses and purposes, that is to say: To have, hold, manage and control, bargain, sell, transfer, exchange, invest and reinvest the proceeds thereof; to collect the income therefrom, and out of said income pay over one-half thereof to the Trustees of a certain Trust created by agreement in writing, dated the 7th day of January, 1930, made and executed by Miles Standish, the party of the first part therein named, and Miles Standish and Allan M. Standish, his son, the parties of the second part therein named, their successors and survivors, which said trust agreement is hereby referred to and made a part hereof, in trust, nevertheless, for the use and benefit of my grandchildren, Patricia Standish, and Beatrice Standish, the children of my said son, Allan M. Standish, and for the use and benefit of any other child or children hereafter born to my said son Allan M. Standish, in equal shares, as provided by the terms of said last named Trust, and to pay over the remaining one-half of said income to my said son Allan M. Standish, in his own right and for his own use and benefit; and as fast as said property is sold and the proceeds thereof collected, pay over and distribute the same in the manner and in the same proportions as said income is to be paid over and distributed; * * * in any event, this Trust shall terminate and division of the property shall be made as aforesaid, not later than fifteen (15) years from the date of my death.

The will was not probated in Oregon. No admin-

istrator of the decedent's estate was appointed in that State. The decedent had no debts in Oregon. The will was probated in California on June 29, 1932. The estate was not distributed until July 24, 1942. In the decree ordering the final distribution thereof, the Superior Court of the State of California for Santa Clara County decreed that the petitioner was entitled to one-half of the corpus of the specified property of the estate of his own use and benefit, and the other [38] one-half should go to him in trust for the benefit of his two children, Patricia Standish and Beatrice Standish, at that time adult persons.

In 1934 the petitioner lent \$5,000 to the Yorkville Lumber Company. Hickey also made a loan to it which, in 1940, amounted to \$8,000. The loans by the petitioner and Hickey were secured by a lien on all of the physical assets of the company. The company went out of business, and a trustee sold all of its assets for \$1,975.31. On December 16, 1940, the trustee notified the petitioner that all of the company's assets had been turned into cash and that the petitioner's maximum recovery would be \$760. Later the company denied the validity of the lien, a law suit followed and in 1943 the petitioner and Hickey obtained a judgment for \$1,957.56. On November 1, 1943, the petitioner had expenses against the judgment aggregating \$966.76, leaving an ultimate net recovery of \$990.80 on the judgment. Hickey had previously recovered payments on the debt in which the petitioner had not shared. Accordingly, Hickey's executors agreed to a settle-

ment whereby the petitioner received the entire amount of the judgment.

The respondent held that "the loss of \$10,512.92 claimed as sustained by the Miles Standish Trust upon the loss of certain timber property because of failure to pay taxes owing to the State of Oregon is disallowed on the ground that any loss sustained is deductible by the Estate of Miles Standish, Deceased, or trusts created by him, either prior to death or in his will."

The respondent also reduced the bad debt deduction claimed on a loan made to Yorkville Lumber Company by \$1,215.31, computed as follows: [39]

Loan made June 22, 1934.....	\$5,000.00
Proceeds in liquidation	1,975.31
<hr/>	
Bad debt worthless in 1940.....	\$3,024.69
Amount claimed on the return.....	4,240.00
<hr/>	
Amount disallowed	\$1,235.31 (sic)

OPINION

Van Fossan, Judge: We consider first the issue as to the correct amount of the bad debt against the Yorkville Lumber Company which became worthless in 1940. The petitioner claimed a loss of \$4,240, based on the recovery of \$760 as the partnership's share of the amount paid to the trustee in that year. The respondent charged against the loss of the original loan of \$5,000 the entire amount, (\$1,975.31) of the payment held by the trustees.

The petitioner's contention is supported by the record. The evidence is uncontroverted that on

December 16, 1940, the trustee had sold all of the assets of the company and that the company had no other source from which its debt to the petitioner and Hickey could be paid. The trustee held the fund for the benefit of the petitioner and Hickey. The worthlessness of the debt was definitely established at that time. Hickey and the petitioner were the creditors to whom the amount of the recovery was payable in the proportions then known and accepted as the basis of the division between them.

The subsequent suit resulting in judgment and the adjustment made between the petitioner and Hickey's executor relating to items not in the record, are not pertinent to the issue. The respondent has overlooked the fact that the recovery in 1940 was for the benefit of both the petitioner and Hickey and has misstated the amount of the "proceeds of [40] liquidation." The partnership is entitled to the deduction of the bad debt in the sum of \$4,240.27 (\$5,000 minus five-thirteenths of \$1,975.31). If any part of the ultimate net recovery in 1943 represented income to petitioner it was a matter for accounting in that year.

The second issue calls into question the validity of a trust instrument executed by Miles Standish on June 17, 1932, and also the effect of a testamentary trust established by the will of Miles Standish. The petitioner contends that the provisions of the first trust were void as violating the rule against perpetuities and that no testamentary trust was set up as to the residue devised to Allan Standish under

Paragraph Fourth of the will. He argues that the will makes a direct devise of one-half of the estate to him as held by the California court. He does not discuss the status of the other half but appears to concede that the will created a trust as to it.

The respondent argues that no judicial determination of the validity of the inter vivos trust (of June 17, 1932) has been made; that the trust did not violate the rule against perpetuities; that in case the trust should be declared invalid by this Court the property would revert to Miles Standish, subject to the testamentary disposition made by the will; and that the fact that the beneficiaries entitled to the trust income may ultimately receive the corpus does not invalidate the trust.

It appears clear that if the trust of June 17, 1932, did not violate the rule against perpetuities, as contended by the petitioners, a valid trust was created, which trust fixed the ownership of the [41] property in question and accordingly fixes the liability for income taxes and the rights to losses arising from such property. For aught that appears, the trust has been in effect for all the years since its creation and has been recognized by the parties, the present instance being the only time its validity has been questioned.

It is elemental that the law favors the vesting of estates. It is also elemental that the law tends to support the intention of a grantor or a trustor, if such intention can be ascertained. Here it is obvious that by the trust Miles Standish was planning the future of his son Allan and his wife and

their two children. The same intention involving the same parties is evident in his will dated two years prior. By the trust he left the income as at the date of his death (which occurred five days later) 51 per cent to Allan Standish, 17 per cent to Beatrice M. Standish (Allan's wife) and 16 per cent each to the two grandchildren, Patricia and Beatrice. This was to continue until the youngest grandchild became 30 years of age, when the trustee was to convey the corpus of the trust to the beneficiaries then living, in the same proportions as the income payments. Any additional grandchild living at the date of the death of the trustor was to share equally with those then living.

In *Simes Law of Future Interests*, Vol. II, page 103, appears the following:

Sec. 356. Intermediate Gift of Income.

An intermediate gift of the income to the legatee or devisee who is to receive the ultimate gift on attaining a given age is an important element tending to show that the gift is vested and not contingent. This would seem to be for the reason that the gift of income shows that the testator intended the legatee or devisee to take some benefit [42] from the gift of the principal immediately on the testator's death, and that the postponement of possession was merely for the benefit of the donee. The same presumption in favor of the vested character of the gift obtains where only a portion of the income is to be given for maintenance.

The following statement from the opinion of the

Pennsylvania Supreme Court in Appeal of Reed, 118 Pa. St. 215, 11 Atl. 787, is also in point:

* * * And while it is true as a general rule, as before observed, that where the time or other condition is annexed to the substance of the gift and not merely to the payment, the legacy is contingent, yet it is equally true that a well recognized exception to the rule is, that where interest, whether by way of maintenance or otherwise, is given to the legatee in the meantime, the legacy shall, notwithstanding the gift appears to be postponed, vest immediately on the death of the testator.

It is clear that there was a vesting in possession of the beneficiaries of the income of the trust as of the date of the grantor's death. We are of the opinion that by the terms of the trust, under the law, there was also, as of that date, an immediate vesting of interest in the corpus or remainder. The fact that as of the date of the trust there was a possibility of divesting of the estates of the grandchildren and a redistribution to accommodate an after-born child does not affect the vesting or make it contingent. It is our opinion that, looking to the four corners of the trust, the grantor contemplated immediate vesting of interest of the corpus of the property in the several beneficiaries.

The consequence of our ruling that the property had vested as of the date of the grantor's death is that petitioners are not entitled to deduct the loss sustained on the Coos County and Douglas County properties. [43]

The situation is not, in any wise, affected by the

decree of the California Court of Probate entered in 1942. This adjudication dealt with wholly different specified property and does not purport to deal with or affect in any way the property here in question.

The record discloses no evidence to warrant the imposition of penalties for "negligence or intentional disregard to rules and regulations," as charged by the respondent. The petitioners disclaimed any such act or intent. The notices of deficiency reveal no more than the ordinary difference of opinion between taxpayers and the Treasury Department. Therefore, no such penalties will attach.

Reviewed by the Court.

Decisions will be entered under Rule 50. [44]

The Tax Court of the United States
Washington
Docket No. 3949

A. M. STANDISH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the opinion of the Court promulgated March 19, 1945, the respondent, on April 17, 1945,

filed a proposed computation of tax in the above entitled proceeding and the case having been called for hearing on June 20, 1945, at which time no objection was offered to the respondent's recomputation, it is

Ordered and Decided: That there are deficiencies in income tax for the years 1940 and 1941 in the respective amounts of \$82.57 and \$2,055.37.

Enter:

Entered June 20, 1945.

[Seal] (s) ERNEST H. VAN FOSSAN,
Judge. [45]

The Tax Court of the United States
Washington

Docket No. 3950

BEATRICE M. STANDISH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the opinion of the Court promulgated March 19, 1945, the respondent filed a proposed computation of tax on April 17, 1945, and the proceeding having been called for hearing on June 20,

1945, at which time no objection was offered to the respondent's recomputation, it is

Ordered and Decided: That there are deficiencies in income tax for the years 1940 and 1941 in the respective amounts of \$82.54 and \$2,055.37.

Enter:

Entered June 20, 1945.

[Seal] (s) ERNEST H. VAN FOSSAN,
Judge. [46]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 3949

In the Matter of

A. M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES BY THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

A. M. Standish, your petitioner, pursuant to the
provisions of Sections 1141 and 1142 of the Internal

Revenue Code respectfully petitions this Honorable Court to review the decision of The Tax Court of the United States entered on the 20th day of June, 1945, and finding deficiencies in income tax, together with additional tax under the provisions of the Internal Revenue Code (Sect. 272) in the total amount of \$82.57 for the year 1940, and the total amount of \$2055.37 for the year 1941.

I.

JURISDICTION

Your petitioner is a citizen of The United States of America having, during the taxable years involved, and now having his residence and place of business in the County of Santa Clara [47] State of California. Petitioner timely filed his Federal income tax returns in respect to which the aforementioned tax liabilities arose with the Collector of Internal Revenue, First District of California, located in the City and County of San Francisco, State of California, which is situate within the jurisdiction of The United States Circuit Court of Appeals for the Ninth Judicial Circuit.

II.

PRIOR PROCEEDINGS

The Commissioner of Internal Revenue by his letter dated November 8, 1943, asserted a deficiency in petitioner's tax liability for the year 1940 in the sum of \$135.05 and a penalty of five per centum in the amount of \$6.80. He also asserted a deficiency

in petitioner's tax liability for the year 1941 in the sum of \$2,055.37 and a penalty of five per centum in the amount of \$102.77.

Thereafter, and within the time prescribed by law, the petitioner filed with The Tax Court of The United States his petition under the aforesaid letter requesting the redetermination of such deficiencies. The proceedings duly came on for hearing on September 19, 1944, at which time the hearing of the petition of this petitioner was consolidated with the hearing of a petition theretofore filed by Beatrice M. Standish. The proceedings were submitted to The Tax Court of The United States upon oral testimony of witnesses and documentary evidence applicable to the two proceedings.

Thereafter, and on March 10, 1945, The Tax Court of The United States made its report and rendered a memorandum opinion [48] approving in part the determinations of the Commissioner.

Thereafter and on June 20, 1945, decisions were made and entered in each of the two proceedings by The Tax Court of The United States whereby final orders of redetermination of deficiencies for the respective years involved were made and entered in each of said proceedings as follows:

Year	Deficiency in Income Tax
1940	\$ 82.57
1941	2055.37

III.

STATEMENT OF THE NATURE OF
THE CONTROVERSY

This proceeding is for the years 1940 and 1941 (Docket #3949) and involves income tax and a five per centum penalty for asserted negligence under Section 293 (a) of the Internal Revenue Code.

The controversy between petitioner (appellant before this Court) and the Commissioner of Internal Revenue involved several issues which by reason of the decision made and entered by The Tax Court of the United States, have been reduced to two.

1. Whether a trust instrument executed by Miles Standish on June 17, 1932, was valid, or was void because the provisions thereof violated the rule against perpetuities.

2. Whether the testamentary trust set up as to the residue by the Will of Miles Standish under paragraph "Fourth" of the Will was effective as to the share of said residue devised and bequeath to Allan Standish, or, was the share of said residue so devised and bequeathed to Allan Standish vested in Allan Standish free of any trust. [49]

IV.

ASSIGNMENTS OF ERROR

In assigning the errors which petitioner believes to have been committed by The Tax Court of The United States, petitioner assigns as error the following acts or omissions of the said The Tax Court of The United States:

(1) The failure to determine that the trust instrument dated June 17, 1932, and executed by Miles Standish, by its provisions and in particular by the provisions set forth verbatim in the said report or memorandum opinion of The Tax Court of The United States, violated the rule against perpetuities as said rule is applicable in the States of California and Oregon.

(2) The erroneous determination that the trust instrument of June 17, 1932 effected a valid inter vivos transfer of title to the timber lands more particularly described therein.

(3) Failure to find and determine that the said trust instrument of date June 17, 1932, reserved the proceeds and income from the property covered by said instrument to the trustor during his lifetime.

(4) The failure to find and determine that under the provisions of paragraph "Fourth" of the Last Will of Miles Standish, deceased, there vested upon the testator's death a one-half interest in the residue of testator's property (which included Coos County and Douglas County, Oregon, lands) in A. M. Standish as his individual property, free of any trust.

(5) The failure to find and determine that the loss sustained from the abandonment and non-payment of taxes upon the said lands situate in Coos and Douglas Counties, State of [50] Oregon, is deductible from the partnership income as set forth in the partnership return of this petitioner and his wife, Beatrice M. Standish, filed for the taxable year 1941; and that such loss is not deductible from the income

of the estate of Miles Standish, deceased, or the income of any trust created by said Miles Standish either prior to his death or under his Will.

(6) The failure to find and determine that the said loss in the sum of \$7,741.80 resulting from the abandonment and non-payment of taxes upon the undivided interest in the timber properties located in Coos and Douglas Counties, State of Oregon, was sustained by the partnership composed of A. M. Standish and Beatrice M. Standish, as the successor in interest in the said undivided interest in said timber lands of the said A. M. Standish rather than by any estate or trust of, or created by, Miles Standish.

(7) In making the determination complained of in assignment 2 hereinabove set forth, the failure to make any finding that under the provisions of the trust instrument executed on June 17, 1932, by Miles Standish, the said Miles Standish reserved to himself for the balance of his lifetime, the proceeds from the sale of and the income derived from the assets purported to have been conveyed by said trust instrument; and that the provisions of said trust instrument did not effect an intermediate gift of the income to any of the persons who under the provisions thereof is to receive the ultimate gift on obtaining a given age.

(8) The failure to find and determine that by the provisions of the said trust instrument of date June 17, 1932, no interest is given to the beneficiaries during the lifetime of the [51] trustor.

(9) The finding and determination that: "the

fact that as of the date of the trust there was a possibility of the divesting of the estates of the grandchildren and a redistribution to accommodate an after-born child, does not effect the vesting or make it, (the gift) contingent."

(10) In finding and determining that the grantor, Miles Standish, contemplated immediate vesting of interest of the corpus of the property in the several beneficiaries at the time of the execution of the said trust instrument on June 17, 1932.

(11) In determining that this petitioner is not entitled to deduct the loss sustained on the Coos County and Douglas County properties.

(12) In determining that the situation is not in any wise effected by the decree of the California Court of Probate entered in 1942; and that said adjudication does not effect in any way title to the properties in Coos and Douglas Counties, Oregon.

(13) The intermingling of findings of fact, conclusions as to the facts and conclusions of law, in such manner as to render the decision of the Board in its report or memorandum opinion arbitrary and contrary to law.

Wherefore, Your petitioner prays that the decision of The Tax Court of The United States be reviewed by The United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with law, and the rules of said court for filing, and that appropriate action be taken to the end that the er-

rors complained of herein [52] be reviewed and corrected by said Court.

A. M. STANDISH,
Petitioner.

R. CLARENCE OGDEN,
Counsel for Petitioner.

State of California,

City and County of San Francisco—ss.

A. M. Standish, being first and duly sworn, says:

I am the Petitioner and Appellant above named; I have read the foregoing Petition for Review and know the contents thereof, and the facts set forth therein are true as I verily believe; that said Petition is filed in good faith and not for the purpose of delay.

A. M. STANDISH.

Subscribed and sworn to Sept. 8th, 1945.

[Seal] LULU P. LOVELAND,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires August 27, 1947. [53]

In the Tax Court of the United States

Docket No. 3949

In the Matter of:

A. M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To the Commissioner of Internal Revenue, and to
J. P. Wenchel, Chief Counsel, Attorney for
Respondent, Bureau of Internal Revenue
Building, Washington, D. C.:

You are hereby notified that on the 12th day of
September, 1945, a petition for review by The
United States Circuit Court of Appeals for the
Ninth Circuit, of the decision of The Tax Court of
The United States, heretofore rendered in the above
entitled cause, was mailed to the Clerk of Said
Court; a copy of the Petition as filed is attached
hereto and served upon you.

Dated: September 12th, 1945.

R. CLARENCE OGDEN,
Attorney for Petitioner.

Service of the foregoing Notice of Filing and a
copy of the petition for review is hereby acknowl-
edged this day of September, 1945.

.....
Chief Counsel, Bureau of Internal Revenue, At-
torney for Respondent. [54]

[Title of Tax Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

Florence Easley, being first duly sworn, deposes and says:

That she is a citizen of the United States over the age of 21 years and not a party to the above entitled proceedings; that on the 12th day of September, 1945, she deposited in the United States Post Office in San Francisco, California, addressed to the Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., a copy of Petition for Review in the above entitled proceedings; together with Notice of Mailing Petition for Review addressed to said Commissioner of Internal Revenue, and to J. P. Wenchel, Chief Counsel, attorney for Commissioner; that said copy of Petition and Notice were enclosed in an envelope addressed to the Chief Counsel of Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., with postage prepaid thereon.

FLORENCE EASLEY.

Subscribed and sworn to before me this 12th day of September, 1945.

[Seal] LULU P. LOVELAND,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires August 27, 1947.

[Endorsed]: T.C.U.S. Filed Sept. 17, 1945. [55]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 3950

In the Matter of:

BEATRICE M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES BY THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit:

Beatrice M. Standish, your petitioner, pursu-
ant to the provisions of Sections 1141 and 1142 of
the Internal Revenue Code respectfully petitions
this Honorable Court to review the decision of The
Tax Court of The United States entered on the
20th day of June, 1945, and finding deficiencies in
income tax, together with additional tax under
the provisions of the Internal Revenue Code (Sect.
272) in the total amount of \$82.57 for the year
1940, and the total amount of \$2055.37 for the
year 1941.

I.

JURISDICTION

Your petitioner is a citizen of the United States of America, having, during the taxable years involved, and now having [56] her residence and place of business in the County of Santa Clara, State of California. Petitioner timely filed her Federal income tax returns in respect to which the aforementioned tax liabilities arose with the Collector of Internal Revenue, First District of California, located in the City and County of San Francisco, State of California, which is situate within the jurisdiction of The United States Circuit Court of Appeals for the Ninth Judicial Circuit.

II.

PRIOR PROCEEDINGS

The Commissioner of Internal Revenue by his letter dated November 8, 1943, asserted a deficiency in petitioner's tax liability for the year 1940 in the sum of \$135.05 and a penalty of five per centum in the amount of \$6.80. He also asserted a deficiency in petitioner's tax liability for the year 1941 in the sum of \$2,055.37 and a penalty of five per centum in the amount of \$102.77.

Thereafter, and within the time prescribed by law, the petitioner filed with The Tax Court of The United States her petition under the aforesaid letter requesting the redetermination of such deficiencies. The proceedings duly came on for hearing on September 19, 1944, at which time the hearing

of the petition of this petitioner was consolidated with the hearing of a petition theretofore filed by A. M. Standish. The proceedings were submitted to The Tax Court of The United States upon oral testimony of witnesses and documentary evidence applicable to the two proceedings.

Thereafter, and on March 19, 1945, The Tax Court of [57] The United States made its report and rendered a memorandum opinion approving in part the determinations of the Commissioner.

Thereafter and on June 20th, 1945, decisions were made and entered in each of the two proceedings by The Tax Court of the United States whereby final orders of redetermination of deficiencies for the respective years involved were made and entered in each of said proceedings as follows:

Year	Deficiency in Income Tax
1940	\$ 82.57
1941	2055.37

III.

STATEMENT OF THE NATURE OF THE CONTROVERSY

This proceeding is for the years 1940 and 1941 (Docket #3950) and involves income tax and a five per centum penalty for asserted negligence under Section 293 (a) of the Internal Revenue Code.

The controversy between petitioner (appellant before this court) and the Commissioner of Internal Revenue involved several issues which by

reason of the decision made and entered by The Tax Court of The United States, having been reduced to two.

1. Whether a trust instrument executed by Miles Standish on June 17, 1932, was valid, or was void because the provisions thereof violated the rule against perpetuities.

2. Whether the testamentary trust set up as to the residue by the Will of Miles Standish under paragraph "Fourth" of the Will was effective as to the share of said residue devised and bequeathed to Allan M. Standish, or, was the share of said residue so devised and bequeathed to Allan Standish vested in [58] Allan Standish free of any trust.

IV.

ASSIGNMENTS OF ERROR

In assigning the errors which petitioner believes to have been committed by The Tax Court of The United States, petitioner assigns as error the following acts or omissions of the said The Tax Court of The United States:

(1) The failure to determine that the trust instrument dated June 17, 1932, and executed by Miles Standish, by its provisions and in particular by the provisions set forth verbatim in the said report or memorandum opinion of The Tax Court of the United States, violated the rule against perpetuities as said rule is applicable in the States of California and Oregon.

2. The erroneous determination that the trust instrument of June 17, 1932, effected a valid *inter vivos* transfer of title to the timber lands more particularly described therein.

(3) Failure to find and determine that the said trust instrument of date June 17, 1932, reserved the proceeds and income from the property covered by said instrument to the trustor during his lifetime.

(4) The failure to find and determine that under the provisions of paragraph "Fourth" of the Last Will of Miles Standish, there vested upon the testator's death a one-half interest in the residue of testator's property (which included Coos County and Douglas County, Oregon, lands) in A. M. Standish as his individual property, free of any trust.

(5) The failure to find and determine that the loss sustained from the abandonment and non-payment of taxes upon the [59] said lands situate in Coos and Douglas Counties, State of Oregon, is deductible from the partnership income as set forth in the partnership return of this petitioner and her husband, A. M. Standish, filed for the taxable year 1941; and that such loss is not deductible from the income of the estate of Miles Standish, deceased, or the income of any trust created by said Miles Standish either prior to his death or under his Will.

(6) The failure to find and determine that the said loss in the sum of \$7,741.80 resulting from the

abandonment and non-payment of taxes upon the undivided interest in the timber properties located in Coos and Douglas Counties, State of Oregon, was sustained by the partnership composed of A. M. Standish and Beatrice M. Standish, as the successor in interest in the said undivided interest in said timber lands of the said A. M. Standish rather than by any estate or trust of, or created by, Miles Standish.

(7) In making the determination complained of in assignment 2 hereinabove set forth, the failure to make any finding that under the provisions of the trust instrument executed on June 17, 1932, by Miles Standish, the said Miles Standish reserved to himself for the balance of his lifetime, the proceeds from the sale of and the income derived from the assets purported to have been conveyed by said trust instrument; and that the provisions of said trust instrument did not affect an intermediate gift of the income to any of the persons who under the provisions thereof is to receive the ultimate gift on obtaining a given age.

(8) The failure to find and determine that by the provisions of the said trust instrument of date June 17, 1932, no [60] interest is given to the beneficiaries during the lifetime of the trustor.

(9) The finding and determination that: "the fact that as of the date of the trust there was a possibility of the divesting of the estates of the grandchildren and a redistribution to accommodate an after-born child, does not affect the vesting or make it (the gift) contingent."

(10) In finding and determining that the grantor, Miles Standish, contemplated immediate vesting of interest of the corpus of the property in the several beneficiaries at the time of the execution of the said trust instrument on June 17, 1932.

(11) In determining that this petitioner is not entitled to deduct the loss sustained on the Coos County and Douglas County properties.

(12) In determining that the situation is not in any wise affected by the decree of the California Court of Probate entered in 1942; and that said adjudication does not affect in any way title to the properties in Coos and Douglas Counties, Oregon.

(13) The intermingling of findings of fact, conclusions as to the facts and conclusions of law, in such manner as to render the decision of the Board in its report or memorandum opinion arbitrary and contrary to law.

Wherefore, Your petitioner prays that the decision of The Tax Court of The United States be reviewed by The United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with law, and the rules of said court for filing, and that appropriate action be taken to the end that the errors complained of herein be [61] reviewed and corrected by said Court.

BEATRICE M. STANDISH,
Petitioner.

R. CLARENCE OGDEN,
Counsel for Petitioner.

State of California,

County of San Francisco—ss.

Beatrice M. Standish, being first and duly sworn,
says:

I am the petitioner and appellant above named;
I have read the foregoing Petition for Review and
know the contents thereof, and the facts set forth
therein are true as I verily believe; that said peti-
tion is filed in good faith and not for purpose of
delay.

BEATRICE M. STANDISH.

Subscribed and sworn to Sept. 8th, 1945.

[Seal] LULU P. LOVELAND,

Notary Public in and for the City and County
of San Francisco, State of California.

My commission expires August 27, 1947. [62]

In the Tax Court of the United States

Docket No. 3950

In the Matter of

BEATRICE M. STANDISH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To Commissioner of Internal Revenue, and to J. P.
Wenchel, Chief Counsel, Attorney for Respond-
ent, Bureau of Internal Revenue Building,
Washington, D. C.:

You are hereby notified that on the 12th day of September, 1945, a Petition for Review by The United States Circuit Court of Appeals for the Ninth Circuit, of the decision of The Tax Court of the United States, heretofore rendered in the above entitled cause, was mailed to the Clerk of said Court, a copy of the Petition as filed is attached hereto and served upon you.

Dated: September 12th, 1945.

R. CLARENCE OGDEN,
Attorney for Petitioner.

Service of the foregoing Notice of Filing and a copy of the petition for review is hereby acknowledged this day of September, 1945.

.....

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent. [63]

[Title of Tax Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,
City and County of San Francisco—ss.

Florence Easley, being first duly sworn, deposes and says:

That she is a citizen of the United States over the age of 21 years and not a party to the above entitled proceedings; that on the 12th day of September, 1945, she deposited in the United States Post Office in San Francisco, California, addressed

to the Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., a copy of Petition for Review in the above entitled proceedings; together with Notice of Mailing Petition for Review addressed to said Commissioner of Internal Revenue, and to J. P. Wenchel, Chief Counsel, attorney for Commissioner; that said copy of Petition and Notice were enclosed in an envelope addressed to the Chief Counsel of Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., with postage prepaid thereon.

FLORENCE EASLEY,

Subscribed and sworn to before me this 12th day of September, 1945.

[Seal] LULU P. LOVELAND,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires August 27, 1947.

[Endorsed]: T.C.U.S. Filed Sept. 17, 1945. [64]

[Title of Tax Court and Cause—No. 3949.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In compliance with paragraph (d) of Rule 75 of the Rules of Civil Procedure for the District Court of The United States as made applicable for review of a decision of The Tax Court of The United States by Rule 30 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the

above named petitioner herewith states the points on which he intends to rely on the pending petition for review of the decision of said The Tax Court of The United States in the above entitled proceedings.

Petitioner will rely upon all of the assignments of error set forth in the petition for review of the decision in the above entitled proceedings by The United States Circuit Court of Appeals for the Ninth Circuit, filed with The Tax Court of the United States on September 17th, 1945.

1. The Tax Court of The United States erred in determining that for the year 1941 petitioner was not entitled to deduct [65] the loss reported in the partnership return of Beatrice M. Standish and this petitioner resulting from the abandonment and non-payment of taxes upon the undivided interest in the timber properties located in Coos and Douglas Counties, State of Oregon, in the sum of \$7,741.80.

2. The Tax Court of The United States erred in determining that the loss resulting from the abandonment and tax sale for non-payment of taxes of the timber lands above mentioned was the loss of a trust estate created by Miles Standish by trust instrument dated June 17, 1932, was not the loss sustained by the partnership of Beatrice M. Standish and this petitioner.

3. The Tax Court of The United States erred in the failing to allow the petitioner a deduction for his half of said loss in the sum of \$7,741.80 re-

sulting from the abandonment and tax sale for non-payment of taxes of the 25% interest owned by said partnership in the said timber lands located in Coos and Douglas Counties, State of Oregon, for the taxable year 1941.

4. The Tax Court of The United States erred in finding and determining that "the fact that as of the date of the trust there was a possibility of the divesting of the estates of the grandchildren and a redistribution to accommodate an after-born child, does not affect the vesting or make it contingent."

5. The Tax Court of The United States erred in finding and determining that Miles Standish, the grantor named in that trust instrument dated June 17, 1932, "contemplated immediate vesting of interest of the corpus of the property in the several beneficiaries."

6. That The Tax Court of The United States erred in [66] the determining that "the consequence of our ruling that the property had vested as of the date of grantor's death is that petitioners are not entitled to deduct the loss sustained on the Coos and Douglas Counties properties."

7. That The Tax Court of The United States erred in finding and determining that "the situation is not, in any wise, affected by the decree of the California Court of Probate entered in 1942. This adjudication dealt with wholly different specified property and does not purport to . . . affect in any way the property here in question."

8. The Tax Court of The United States further erred in failing to make findings of fact in conformance with the evidence and in intermingling as to the findings of fact, facts, conclusions as to facts, and conclusions of law in such manner as to conflict with the facts and the law:

(a) In failing to find that the trust instrument of date June 17, 1932, by its terms reserved to the grantor and trustor a beneficial interest in the trust property for the balance of the trustor's life, and did not vest in any of the beneficiaries who, under the provisions thereof is to receive the ultimate gift on obtaining a given age, any interest in said trust property until the death of the trustor.

(b) In failing to find and to conclude from the facts that by the provisions of the said trust instrument of date June 17, 1932, no interest is given to the beneficiaries who are to receive the ultimate gift on obtaining a given age, during the lifetime of the trustor. [67]

(c) In failing to find or conclude from the facts that the grantor, Miles Standish, did not, at the time he executed the trust instrument of date June 17, 1932, contemplate immediate vesting of interests of the corpus of the trust property in the several beneficiaries who were to receive the ultimate gift on obtaining a given age.

Respectfully submitted,

R. CLARENCE OGDEN,

Attorney for Petitioner.

Admission of service of the foregoing Statement of Points on which Petitioner intends to Rely is hereby admitted this day of September, 1945.

.....

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed Sept. 27, 1945. [68]

[Title of Tax Court and Cause—No. 3950.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

In compliance with paragraph (d) of Rule 75 of the Rules of Civil Procedure for the District Court of The United States as made applicable for review of a decision of The Tax Court of The United States by Rule 30 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the above named petitioner herewith states the points on which she intends to rely on the pending petition for review of the decision of said The Tax Court of The United States in the above entitled proceedings.

Petitioner will rely upon all of the assignments of error set forth in the petition for review of the decision in the above entitled proceedings by The United States Circuit Court of Appeals for the Ninth Circuit, filed with The Tax Court of the United States on September 17th 1945.

1. The Tax Court of The United States erred

in determining that for the year 1941 petitioner was not entitled to deduct the loss reported in the partnership return of A. M. Standish and this petitioner resulting from the abandonment and [69] non-payment of taxes upon the undivided interest in the timber properties located in Coos and Douglas Counties, State of Oregon, in the sum of \$7,741.80.

2. The Tax Court of The United States erred in determining that the loss resulting from the abandonment and tax sale for non-payment of taxes of the timber lands above mentioned was the loss of a trust estate created by Miles Standish by trust instrument dated June 17, 1932 was not the loss sustained by the partnership of A. M. Standish and this petitioner.

3. The Tax Court of The United States erred in the failing to allow the petitioner a deduction for her half of said loss in the sum of \$7,741.80 resulting from the abandonment and tax sale for non-payment of taxes of the 25% interest owned by said partnership in the said timber lands located in Coos and Douglas Counties, State of Oregon for the taxable year 1941.

4. The Tax Court of The United States erred in finding and determining that "the fact that as of the date of the trust there was a possibility of the divesting of the estates of the grandchildren and a redistribution to accommodate an afterborn child, does not affect the vesting or make it contingent."

5. The Tax Court of The United States erred in finding and determining that Miles Standish, the grantor named in that trust instrument dated June 17, 1932 "contemplated immediate vesting of interest of the corpus of the property in the several beneficiaries."

6. That The Tax Court of The United States erred in determining that "the consequence of our ruling that the property had vested as of the date of grantor's death is that [70] petitioners are not entitled to deduct the loss sustained on the Coos and Douglas Counties properties."

7. That The Tax Court of The United States erred in finding and determining that "the situation is not, in any wise, affected by the decree of the California Court of Probate entered in 1942. This adjudication dealt with wholly different specified property and does purport to . . . affect in any way the property here in question."

8. The Tax Court of The United States further erred in failing to make findings of fact in conformance with the evidence and in intermingling as to the findings of fact, facts, conclusions as to facts, and conclusions of law in such manner as to conflict with the facts and the law:

(a) In failing to find that the trust instrument of date June 17, 1932 by its terms reserved to the grantor and trustor a beneficial interest in the trust property for the balance of the trustor's life, and did not vest in any of the beneficiaries who, under the provisions thereof is to receive the ulti-

mate gift on obtaining a give age, any interest in said trust property until the death of the trustor.

(b) In failing to find and to conclude from the facts that by the provisions of the said trust instrument of date June 17 1932 no interest is given to the beneficiaries who are to receive the ultimate gift on obtaining a given age, during the lifetime of the trustor.

(c) In failing to find or conclude from the facts that the grantor, Miles Standish, did not, at the time he executed the trust instrument of date June 17, 1932, contemplate immediate [71] vesting of interest of the corpus of the trust property in the several beneficiaries who were to receive the ultimate gift on obtaining a given age.

Respectfully submitted,

R. CLARENCE OGDEN

Attorney for Petitioner

Admission of service of the foregoing Statement of Points on which Petitioner intends to Rely is hereby admitted this day of September, 1945.

.....

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent

[Endorsed]: T.C.U.S. Filed Sept. 27, 1945. [72]

EVIDENCE

Exhibit "A" Part of Reporter's Transcript
For Record on Review

EXCERPTS FROM PROCEEDINGS

The Clerk: At this time we call Docket 3949 and Docket 3950, A. M. Standish and Beatrice M. Standish.

Will you state your appearances for the record, please?

Mr. Ogden: R. Clarence Ogden.

The Clerk: And your address?

Mr. Ogden: 525 Standard Oil Building, San Francisco.

Mr. Mather: T. M. Mather for Respondent.

* * * *

The Court: Thank you.

You may call your first witness.

Mr. Ogden: Yes.

* * * *

Mr. Ogden: Will you take the stand, Mr. Standish?

Whereupon,

ALLAN M. STANDISH

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: May we have your name, please?

The Witness: Allan M. Standish.

(Testimony of Allan M. Standish.)

By Mr. Ogden:

Q. Mr. Standish, you are one of the petitioners in these proceedings? A. Yes. [73]

Q. Your father was Miles Standish?

A. Yes.

Q. And your father, Mr. Standish, died in 1932?

A. Yes.

Q. Do you remember the date?

A. June 22nd.

Q. June 22nd, 1932.

Showing you this deed of trust, I ask you if that deed of trust was executed by your father?

A. Yes.

Q. On what date?

A. On the 17th day of June, 1932.

Mr. Ogden: I will ask that that be received in evidence.

Mr. Mather: No objection.

The Court: Exhibit 1.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 1.)

[Printer's Note]: Petitioner's Exhibit No. 1 set out in full at page 91.

Mr. Ogden: I am not entirely familiar with the proceedings here. Is that to be read in evidence now, or deemed read in evidence?

The Court: It need not be read.

Mr. Ogden: I might state at this time that the particular portions of that deed of trust we have

(Testimony of Allan M. Standish.)

introduced, we claim caused to be void as a conveyance are to be found [74] at the bottom of Page 2 of the deed of trust, and later on Page 4, where this trust is to be left until the youngest of an unborn grandchild becomes thirty years of age. That is, the trust is for the benefit of an unborn grandchild, along with grandchildren already in being, and it is continued until the youngest grandchild becomes thirty years of age. It is therefore created for a longer period of time than lives in being, and twenty-one years.

I suppose that our legal points of view will be taken care of in the brief.

By Mr. Ogden:

Q. Five days after executing that your father died; is that right? A. That's right.

Q. At the time of his death he left a last Will, did he? A. Right.

Q. I show you what purports to be a certified copy of the last Will of Miles Standish, and ask you if that is a certified copy of the original, as the original is filed in the office of the County Clerk of Santa Clara County, State of California:

A. It is.

Mr. Ogden: I ask that this be introduced in evidence. [75]

Mr. Mather: No objection.

The Court: Exhibit 2 in evidence.

(The document referred to was marked and

(Testimony of Allan M. Standish.)

received in evidence as Petitioner's Exhibit No. 2.)

[Printer's Note]: Petitioner's Exhibit No. 2 set out in full at page 105.

Mr. Ogden: I might state simply for the record, the purpose of that is to show that the entire residue of the estate is left to Allan Standish in trust for the benefit of Mr. Standish's or the testator's two grandchildren and the other for the benefit of A. M. Standish in his individual right. In other words, under the terms of the Will, the property—I simply refer to the residue clause of the Will at this time, to call attention of the Court of its effect.

By Mr. Ogden:

Q. Mr. Standish, you did apply for the probate of that Will in California, didn't you?

A. Yes.

Q. In the Superior Court of this State, for the County of Santa Clara? A. Correct.

Q. The estate was not finally distributed until the year 1942, is that right?

A. That's right.

Mr. Ogden: I am offering in evidence a certified copy of the decree of distribution, showing the estate was distributed July 24, 1942. I ask that certified copy be introduced in evidence. [76]

Mr. Mather: No objection.

The Court: Exhibit 3.

(Testimony of Allan M. Standish.)

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 3.)

[Printer's Note]: Petitioner's Exhibit No. 3 set out in full at page 109.

Mr. Ogden: I simply call attention of the Court at this time that that decree of distribution makes no pretense of distributing property outside of California. It only deals with property in California, but it makes no attempt to distribute real property, and distributes one-half of the residue as an interpretation of the Will to A. M. Standish individually and the other half of the residue to A. M. Standish as trustee for his two children in equal shares.

By Mr. Ogden:

Q. I ask you, were there ever any probate proceedings commenced in Oregon? A. No.

Q. Was there ever an executor or administrator appointed over the estate of Miles Standish in Oregon? A. No.

Q. Did Miles Standish have any debts in Oregon? A. No.

Q. You and your wife entered into a partnership agreement in December, 1935, did you not?

A. Yes.

Q. That partnership agreement has been filed with the [77] Treasury Department and has been acted on in connection with your prior yearly income tax return? A. Yes.

(Testimony of Allan M. Standish.)

Q. By that agreement you own half of everything you have between you, and she owns half of everything that you hold between you, whether it was inherited or community? A. Correct.

Q. As partners, and that has been accepted for other years by the Treasury Department?

A. Yes.

Q. Now, shortly after your father's death, the entire estate your father left, both in California, and also the estate he left in Oregon, was appraised for the purpose of fixing an estate tax due the United States Government?

A. That's correct.

Q. As a result of that appraisement, a Mr. Wohlenberg, acting on behalf of the United States Treasury, Engineer Revenue Agent, placed valuations upon the real property in Coos County and the real property in Douglas County?

A. Yes.

Mr. Ogden: I have here a copy—I asked for a certified copy from the Treasury Department—this is a copy of the valuation report in the estate. It is not the original copy, and counsel says that he is willing to stipulate that this copy can be put in for the purpose of valuation as [78] fixed for estate tax purposes.

The Court: For proving what the value was?

Mr. Ogden: The cost basis, yes, in 1932, the Coos and Douglas land.

Mr. Mather: I will stipulate with you that the value—there is a return for estate tax purposes

(Testimony of Allan M. Standish.)

of these properties—the Coos County properties were valued at \$10,261.25, and Douglas County at \$9,201.00.

Mr. Ogden: I wanted to go further, to show how those figures were arrived at.

Mr. Mather: I have no objection to the exhibit if it is offered.

The Court: Exhibit 4.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 4.)

[Printer's Note]: Petitioner's Exhibit No. 4 set out in full at page 118.

The Court: Is it offered to be received as proof of all the facts therein stated?

Mr. Ogden: Yes. That is the purpose.

Mr. Mather: That is agreeable to me. There is no dispute with respect to the value.

The Court: Very well.

By Mr. Ogden:

Q. Mr. Standish, at the time the lands in Coos County were itemized at 520 acres suitable for agriculture, 400 acres of timber lands, and 1,000 acres of cut-over suitable for [79] reforestation—1920 acres—and simply a total value placed of \$16,000 for the land, and then 9,045,000 feet of Douglas fir at \$.50 a thousand was put in to fix the value of the standing timber at \$4,522.50, to give a total valuation of \$20,522.50, and your half interest, the amount stipulated to, that is \$10,261.25.

(Testimony of Allan M. Standish.)

In Douglas County it shows all timber land with fir, cedar, spruce and hemlock standing thereon, and the land is appraised at \$1.

I will ask you, do you know by what method, then—this refers to a conference with you and your representative—Do you know by what method the different lands in Coos County were valued? For instance, the 520 acres?

A. Some of it was considered suitable for agriculture, and some was considered timber land, and some was suitable for reforestation.

Q. What value did he place on that suitable for agriculture? A. I think it was \$28.

Q. A what? A. Per acre.

Q. In other words, the figure of \$28 per acre on the land suitable for agriculture was the figure you used in taking this total of \$16,000 for the 1920 acres? A. That's correct.

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:30 P. M. a recess was taken until 2:00 P. M. of the same day.) [80]

Afternoon Session

2:00 P. M.

Whereupon,

ALLAN M. STANDISH

resumed his testimony as follows:

Direct Examination—Resumed

Mr. Ogden: May I have the last question and answer, please?

(Testimony of Allan M. Standish.)

(The last question and answer were read by the Reporter.)

By Mr. Ogden:

Q. In Coos County, 1920 acres total made up of this 520 acres of land suitable for agriculture, 400 acres of land labeled timber land, and 1000 acres of land suitable for reforestation were given the lump sum valuation of \$16,000. In making up that figure, the unit price of \$28 an acre for the 520 acres of land suitable for agriculture was the figure used by Mr. Wohlenberg?

A. That's correct.

Q. Now, between the year 1932, June of 1932, after your father died, and December 31, 1940, you with Mr. Hickey sold timber and lands from the properties in Coos and Douglas Counties aggregating how much, Mr. Standish?

A. A little over \$7,000, about \$7,200, I think, or \$7,600. [81]

Q. Referring to the figure reported in your income tax return, is your half \$3,000?

A. That was \$3,500 and something.

Q. \$3,521.95? A. That's right.

Q. That was half the total sales of land and timber? A. That's correct.

* * * *

Mr. Ogden: I will ask to introduce this letter from the sheriff of Douglas County to the same effect, Your Honor. Counsel has stipulated that this letter, together with the letter which is an-

(Testimony of Allan M. Standish.)

swered, can be deemed in evidence, and the matters therein recited taken as proof. Is that correct?

Mr. Mather: That is correct.

The Court: Exhibit 5.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 5.)

[Printer's Note]: Petitioner's Exhibit No. 5 set out in full at page 122.

By Mr. Ogden:

Q. Prior to that sale, who had paid the taxes on the property from 1932 to 1936, inclusive?

A. We had.

Q. When you "we", who do you mean?

A. Mr. Hickey and myself.

Q. During the month of June, 1941, certain of the lands in Coos County were also sold, were they not?

A. That's correct. [82]

* * * *

Mr. Ogden: I will ask to introduce this letter from the sheriff of Coos County, setting forth the description.

The Court: Exhibit 6.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 6)

[Printer's Note]: Petitioner's Exhibit No. 6 set out in full at page 124.

Mr. Mather: No objection.

(Testimony of Allan M. Standish.)

Mr. Ogden: That is in evidence to prove the sale of the land described in that letter.

By Mr. Ogden:

Q. The lands in Coos County that were not sold, what type of lands were they as to these three classifications, suitable for reforestation, suitable for agriculture or timber land?

A. They were lands suitable for reforestation.

Q. They were lands that had actually been placed in reforestation? A. Yes.

Q. Showing you this tax statement from Coos County, marked "Reforestation," I will ask you if that is the description of the lands that you then owned at the time of the tax sale, and were not sold at tax sale? A. Yes.

Mr. Ogden: I ask to introduce this reforestation statement from Coos County.

Mr. Mather: No objection.

The Court: Exhibit 7. [83]

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 7.)

[Printer's Note]: Petitioner's Exhibit No. 7 set out in full at page 126.

By Mr. Ogden:

Q. All other lands that were not sold were lands that you had previously sold for this \$3,500.00 that you spoke of? A. Correct.

* * * *

(Testimony of Allan M. Standish.)

Q. There were 520 acres of land in Coos County suitable for agriculture. I will ask you whether or not those 520 acres, and all of them were sold for delinquent taxes in June, 1941? A. Yes.

Q. I will ask you whether or not the lands on which the 9,000,000 feet of fir timber, set forth on Mr. Wohlenberg's report, were all sold in Coos County? A. Yes.

Q. That is, by the tax collector, for delinquent taxes? A. Correct.

Q. In 1941 you filed an income tax return as fiduciary for the Miles Standish Trust?

A. I did.

Q. I will ask you whether or not at that time you were acting upon advice that that trust was a valid trust? A. Yes.

Q. When you filed the return in 1941?

A. Yes.

Q. In that return you reported a loss of \$14,943.60, resulting from the sale of the lands in Coos County and [84] Douglas County, Oregon; is that correct? A. That's correct.

Q. And you computed that by deducting from the original cost basis of all the lands, first the lands in reforestation, not lost for taxes, and also the lands and timber amounting to \$996.70, and the sales previously reported of \$3,521.95?

A. That's right.

* * * *

(Testimony of Allan M. Standish.)

Cross-Examination

By Mr. Mather:

Q. Mr. Standish, I hand you Petitioner's Exhibit 1, and ask you to state whether or not the property that was sold for taxes in 1941 is included in that document? A. Yes.

Q. After the execution of Petitioner's Exhibit 1, was income received from that property?

A. During the period of years some of the property was sold. I don't believe it was income; it was cutting of the timber, or some of the land was sold and reported each year.

Q. During '33, some \$3,700?

A. Some \$3,500 during a period of about '32 to '40, something like that, as reported.

Q. That would be a half interest in the property, I take it? [85] A. Yes.

Q. Who are named as beneficiaries in Petitioner's Exhibit 1? A. Myself and my wife.

* * * *

Q. Were any distributions made to you from that trust from the date of its creation up to 1941?

A. Well, at that period we thought that this was a valid trust, and it was to me, yes.

Q. To the other beneficiaries named therein, distributions were made, were there not?

A. Yes.

Q. In accordance with the terms of the trust, and you were one of the trustees, were you not?

A. Yes.

(Testimony of Allan M. Standish.)

Q. So that distributions were made in accordance with the trust during all of the years up to and including 1941? A. Yes.

Q. Has there been any litigation with respect to that trust instrument? A. No.

Q. There has been no litigation to determine whether or not it is a valid trust or whether it is not, has there been? A. No.

* * *

[Endorsed]: T.C.U.S. Filed Oct. 14, 1944. [86]

PETITIONER'S EXHIBIT NO. 1

DEED OF TRUST.

This Indenture, made and entered into this 17th day of June, 1932, by and between Miles Standish, the first party, hereinafter called Grantor, and Miles Standish, Allan M. Standish, his son, and Beatrice M. Standish, wife of Allan M. Standish, hereinafter called Trustees, as Trustees for the Beneficiaries hereinafter named.

Witnesseth:

That said Grantor, for and in consideration of the love and affection which he bears to his said son, to his said daughter-in-law, and to his two grandchildren, Patricia Standish and Beatrice Standish, children of said Allan M. Standish and Beatrice M. Standish, hereinafter called Beneficiaries, and for the better maintenance, support, protection and livelihood of said Beneficiaries, and for the consideration and upon the trusts hereinafter

Petitioner's Exhibit No. 1—(Continued)

set forth, does hereby grant unto the said Trustees all of that certain real property particularly described in Schedule "A" hereto attached, which Schedule is hereby referred to and by such reference is made a part hereof as though particularly set forth in this paragraph.

To Have and to Hold all of the said property, in trust, however, for the uses and purposes as follows:

First:—The Grantor reserves for his sole use the income and/or proceeds from all of the said property during his lifetime.

Second:—The Grantor reserves the right to add to the property herein mentioned, said additional property to be held for the same uses and purposes as all the rest of the property herein described.

Third:—Notwithstanding anything herein contained it is especially provided and agreed that the Grantor shall have and he hereby especially reserves the right at any time during his life, to revoke and cancel this trust, together with all rights of the Trustees or the Beneficiaries or the successors of the Beneficiaries thereunder, by delivering to the Trustees a notice in writing, duly acknowledged; and immediately upon the delivery of such notice this trust shall be revoked accordingly, and if revoked by such notice the trust fund and the whole thereof and any income therefrom then in the hands of the Trustees shall be delivered on demand to the Grantor, except such portion thereof as may be due to the Trustees for services rendered to said date.

Petitioner's Exhibit No. 1—(Continued)

Fourth:—The property herein referred to shall be held by the Trustees and during the lifetime of the Grantor, the net income and proceeds therefrom shall be paid to the Grantor in quarterly installments as nearly as may be practicable; and upon the death of the Grantor said income and proceeds shall be paid as follows:

(a) Fifty-one per cent (51%) of said net income shall be paid to Allan M. Standish;

(b) Seventeen per cent (17%) of said net income shall be paid to Beatrice M. Standish, wife of Allan M. Standish;

(c) Sixteen per cent (16%) of said net income shall be paid to Patricia Standish;

(d) Sixteen per cent (16%) of said income shall be paid to Beatrice Standish.

This division of the net proceeds and income from the said property shall continue until the youngest grandchild shall have attained the age of thirty (30) years, when the Trustees shall convey to the Beneficiaries then living, all of the property then remaining in this trust, in such proportion as their respective interests are indicated by the percentages upon which the income has been paid to them, and the trust shall cease.

Fifth:—As incidental to the trust herein created the Trustees shall have full power and authority, in their discretion, to manage, control, sell, transfer, mortgage, convey, lease, exchange, and otherwise

Petitioner's Exhibit No. 1—(Continued)

deal with, and dispose of, any or all of the trust estate, and to execute any instruments necessary for the exercise of such powers, and should corporate stock come into said estate to make any and all transfers thereof into their name as in any case may be necessary or proper for and in the administration of the trust; to collect rents or other incomes; to collect at maturity any and all securities, to invest and re-invest the proceeds of the sale of any property, real or personal, and the property in which the proceeds of sales or exchanges may be invested, or property received in exchange, may be again sold or re-exchanged as often as the Trustees shall see fit and the proceeds re-invested; and the Trustees shall also have the power to pay all taxes, assessments and charges levied upon or against the property held in trust, employ clerical or other assistance, and also legal counsel whenever in their judgment it is necessary so to do.

Sixth: The enumeration herein of the powers of the Trustees shall not be considered as limitations, for the Trustees shall have the power, at the expense of the trust, to do all other things which may legally be done by a trustee for the proper care, control, preservation, management or disposition of the property held subject to the trust hereby created.

Seventh:—Should Allan M. Standish predecease the Grantor herein, the latter reserves the right to appoint a successor to said Allan M. Standish without the consent of his co-surviving Trustee, but after

Petitioner's Exhibit No. 1—(Continued)

the death of the Grantor the surviving Trustees are authorized to appoint a trustworthy successor to the Grantor as Trustee, and thereafter, in the event of the death of any of the surviving Trustees, the remaining Trustees shall appoint a trustworthy successor to carry on the provisions of this trust.

Eighth:—In the event that I have any additional grandchild or grandchildren living at the time of my death, the shares of Patricia and Beatrice Standish shall be proportionately reduced so that such additional grandchild or grandchildren shall share equally with them.

Ninth:—In the event that any grandchild shall die prior to the time that the respective beneficial interest due said grandchild shall become payable in whole or part as herein provided, then the invested beneficial interest due said grandchild shall revert as follows:

1. If said deceased grandchild shall leave lawful heir of his or her body then such legal heir or heirs shall become the beneficiary in the place and stead of his or her parent by right of representation.

2. In the event any deceased grandchild leaves no legal heirs, then the beneficial interest to which said grandchild would otherwise be entitled shall revert to the equal benefit of the surviving grandchildren, the legal issue of any deceased grandchild to take by representation.

3. In the event that all of said grandchildren

Petitioner's Exhibit No. 1—(Continued)

die without legal issue prior to the vesting of all of said trust estate, so much as remains shall be paid or delivered to any heirs of the first party under the law of succession as the same exists at the date of this instrument.

Tenth:—The sole, separate and acknowledged receipt of the Grantor, or the other Beneficiaries herein, for his or her respective share or portion of said income, as the same is paid, shall be a complete acquittance to the Trustees or their successors, and deposit in a reliable bank to the credit of the Grantor, or of a Beneficiary, shall be equivalent to delivery by Trustees.

Eleventh:—Before paying any income during any year, to any beneficiary hereinabove named, the Trustees shall retain sufficient funds to pay all taxes and expenses of executing this trust during the current year.

Twelfth:—No bond shall be required of any Trustee hereunder.

In Witness Whereof, the Grantor has hereunto set his hand the day and year first hereinbefore written.

MILES STANDISH

We, the undersigned, named as Trustees in the foregoing Trust Deed, hereby accept the office of Trustee of the said trust.

MILES STANDISH

ALLAN M. STANDISH

BEATRICE M. STANDISH

Petitioner's Exhibit No. 1—(Continued)

SCHEDULE "A."

An undivided one-half interest in the following lands situated in Mendocino County, California, particularly described as follows:

In Township 12 North of Range 12 West,
Mount Diablo Base and Meridian.

	Section
SW $\frac{1}{4}$ of NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$	17
NE $\frac{1}{4}$ of	18
In Township 12 North of Range 13 West.	
SW $\frac{1}{4}$ of NE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$, S $\frac{1}{2}$ of SE $\frac{1}{4}$, except 5 acres off E. side of SE $\frac{1}{4}$ of SE $\frac{1}{4}$, S $\frac{1}{2}$ of NW $\frac{1}{4}$, SW $\frac{1}{4}$ —all in	14
N $\frac{1}{2}$ of NW $\frac{1}{4}$ —timber only	14
E $\frac{1}{2}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of NE $\frac{1}{4}$, both in	15
NE $\frac{1}{4}$ of NW $\frac{1}{4}$, N $\frac{1}{2}$ of NE $\frac{1}{4}$	
N $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$, all in	23
NW $\frac{1}{4}$ of SW $\frac{1}{4}$	24
In Township 12 North of Range 15 West.	
NE $\frac{1}{4}$ of SW $\frac{1}{4}$	11
In Township 13 North of Range 14 West.	
Lots 1, 2 and 4, Undivided $\frac{1}{2}$ of Lot 3 Also the S $\frac{1}{2}$ of the NW $\frac{1}{4}$ —all of.....	4
In Township 13 North of Range 15 West.	
NW $\frac{1}{4}$ of SE $\frac{1}{4}$, N $\frac{1}{2}$ of SW $\frac{1}{4}$ SW $\frac{1}{4}$ of SW $\frac{1}{4}$ —all in	13
In Township 14 North of Range 14 West.	
Lots 1, 2 and 4 W $\frac{1}{2}$ of SW $\frac{1}{4}$ —all of	2
E $\frac{1}{2}$ of E $\frac{1}{2}$ SW $\frac{1}{4}$ of SE $\frac{1}{4}$ —all of.....	3
W $\frac{1}{2}$ or NW $\frac{1}{4}$	11
SW $\frac{1}{4}$ of SW $\frac{1}{4}$, excepting right of way for a wagon road heretofore granted to B. C. Van Zandt	20
N $\frac{1}{2}$ of N $\frac{1}{4}$, except 5 acres in the NW corner of the NW corner of the NW $\frac{1}{4}$, and excepting right of way for a wagon road heretofore granted to B. C. Van Zandt, SW $\frac{1}{4}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of NW $\frac{1}{4}$	29
Undivided $\frac{1}{2}$, E $\frac{1}{2}$ of the SW $\frac{1}{4}$	33

Petitioner's Exhibit No. 1—(Continued)

In Township 15 North of Range 14 West.

	Section
NE $\frac{1}{4}$ of SE $\frac{1}{4}$	4
Lot 4 and SW $\frac{1}{4}$ of NW $\frac{1}{4}$, and NW $\frac{1}{4}$ of SW $\frac{1}{4}$	5
SE $\frac{1}{4}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$	6
NE $\frac{1}{4}$, N $\frac{1}{2}$ of SE $\frac{1}{4}$, NE $\frac{1}{4}$ of NW $\frac{1}{4}$	7
W $\frac{1}{2}$ of W $\frac{1}{2}$, SE $\frac{1}{4}$ of NW $\frac{1}{4}$	
SW $\frac{1}{4}$ of NE $\frac{1}{4}$, W $\frac{1}{2}$ of SE $\frac{1}{4}$, all in	8
NW $\frac{1}{4}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SE $\frac{1}{4}$, NE $\frac{1}{4}$ of SW $\frac{1}{4}$	9
SE $\frac{1}{4}$ of SW $\frac{1}{4}$	10

In Township 15 North of Range 14 West.

SW $\frac{1}{4}$ of NW $\frac{1}{4}$	11
SE $\frac{1}{4}$	17
SE $\frac{1}{4}$ of NW $\frac{1}{4}$	19
S $\frac{1}{2}$ of NE $\frac{1}{4}$,	
N $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of NW $\frac{1}{4}$, all in.....	24
NW $\frac{1}{4}$ of SE $\frac{1}{4}$, N $\frac{1}{2}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$	26
N $\frac{1}{2}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SE $\frac{1}{4}$	
S $\frac{1}{2}$ of NW $\frac{1}{4}$, SW $\frac{1}{4}$ —all in	27
E $\frac{1}{2}$ of E $\frac{1}{2}$	28
NW $\frac{1}{4}$ of SW $\frac{1}{4}$	29
SE $\frac{1}{4}$ of NE $\frac{1}{4}$ —Lots 3 and 4.....	30
E $\frac{1}{2}$ of NE $\frac{1}{4}$, SE $\frac{1}{4}$ of NW $\frac{1}{4}$, E $\frac{1}{2}$ of SW $\frac{1}{4}$,	
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ —all in	33
S $\frac{1}{2}$ of NE $\frac{1}{4}$, SE $\frac{1}{4}$ of SE $\frac{1}{4}$, NW $\frac{1}{4}$,	
N $\frac{1}{2}$ of S $\frac{1}{2}$ —all in.....	34
SW $\frac{1}{4}$ of SE $\frac{1}{4}$, S $\frac{1}{2}$ of SW $\frac{1}{4}$	
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ —all in	35

In Township 15 North of Range 15 West.

SW $\frac{1}{4}$ of SE $\frac{1}{4}$	3
SE $\frac{1}{4}$ of NE $\frac{1}{4}$	9
NE $\frac{1}{4}$ of NW $\frac{1}{4}$	11
SE $\frac{1}{4}$ of SW $\frac{1}{4}$	13
W $\frac{1}{2}$ of SW $\frac{1}{4}$	14
E $\frac{1}{2}$ of SE $\frac{1}{4}$	15
N $\frac{1}{2}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of NE $\frac{1}{4}$, NE $\frac{1}{4}$ of NW $\frac{1}{4}$	24

In Township 14 North of Range 15 West.

Lots 11, 12 and 20	21
W $\frac{1}{2}$ of SW $\frac{1}{4}$	22
NE $\frac{1}{4}$ of NE $\frac{1}{4}$, SE $\frac{1}{4}$ of NW $\frac{1}{4}$, NE $\frac{1}{4}$ of SW $\frac{1}{4}$	
SE $\frac{1}{4}$ of SW $\frac{1}{4}$, and SW $\frac{1}{4}$ of SE $\frac{1}{4}$, all in.....	25

Petitioner's Exhibit No. 1—(Continued)

In Township 16 North of Range 14 West.

	Section
NE $\frac{1}{4}$ of SE $\frac{1}{4}$	5
SE $\frac{1}{4}$ of SE $\frac{1}{4}$	8
S $\frac{1}{2}$ of SE $\frac{1}{4}$	9
Lot 4 and N $\frac{1}{2}$ of Lot 5.....	18
Lot 28	30
Lots 24, 25, 26, 32 and 33.....	31

In Township 16 North of Range 15 West.

SW $\frac{1}{4}$ of SW $\frac{1}{4}$	13
E $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$, S $\frac{1}{2}$ of SW $\frac{1}{4}$	17
NE $\frac{1}{4}$ of NE $\frac{1}{4}$, SE $\frac{1}{4}$ of NE $\frac{1}{4}$ or E $\frac{1}{2}$ of NE $\frac{1}{4}$	20
E $\frac{1}{2}$ of NE $\frac{1}{4}$	23
N $\frac{1}{2}$ of NW $\frac{1}{4}$, SW $\frac{1}{4}$ of NW $\frac{1}{4}$	24
Lot 8 or SE $\frac{1}{4}$ of SE $\frac{1}{4}$	25
Lot 1	28
Lot 1	33

In Township 17 North of Range 15 West.

S $\frac{1}{2}$ of SW $\frac{1}{4}$	18
N $\frac{1}{2}$ of NW $\frac{1}{4}$	19

In Township 18 North of Range 15 West.

S $\frac{1}{2}$ of SW $\frac{1}{4}$	23
NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of NW $\frac{1}{4}$	34

In Township 19 North of Range 15 West.

E $\frac{1}{2}$ of E $\frac{1}{2}$	23
N $\frac{1}{2}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of NE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$	25

In Township 20 North of Range 15 West.

SE $\frac{1}{4}$ of SW $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$	29
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In Township 20 North of Range 16 West.

S $\frac{1}{2}$ of SW $\frac{1}{4}$, NW $\frac{1}{4}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$	12
SE $\frac{1}{4}$ and N $\frac{1}{2}$ of NW $\frac{1}{4}$	25
N $\frac{1}{2}$ of NE $\frac{1}{4}$	26

Petitioner's Exhibit No. 1—(Continued)

In township 24 North of Range 17 West.

	Section
NW $\frac{1}{4}$ of NE $\frac{1}{4}$, NE $\frac{1}{4}$ of NW $\frac{1}{4}$	8
S $\frac{1}{2}$ of SE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$	7
Lots and 9, all that part of the S $\frac{1}{2}$ of Lot 10, and the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$, lying west of center of the South Fork of the Eel River.	
Lots 24, 25, and W $\frac{1}{2}$ of Lot 26	6
Lots 10 and 11	31

In Township 23 North of Range 17 West.

SW $\frac{1}{4}$ of SW $\frac{1}{4}$, less 5 acres, N $\frac{1}{2}$ of S $\frac{1}{2}$	3
Lots 4, 9, 10, 11, 12, 13, 14, 15, 16 and S $\frac{1}{2}$ —all of	4
Lots 9 and 16, E $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$	5
NE $\frac{1}{4}$	8
NE $\frac{1}{4}$ of NE $\frac{1}{4}$	9
NW $\frac{1}{4}$ of NW $\frac{1}{4}$	10

In Township 24 North of Range 18 West.

Lot 2	2
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An undivided one-third interest in the following lands situated in Mendocino County, California, particularly described as follows:

In Township 15 North of Range 16 West.

	Section
SW $\frac{1}{4}$ of NE $\frac{1}{4}$	
N $\frac{1}{2}$ of SE $\frac{1}{4}$, and SE $\frac{1}{4}$ of SE $\frac{1}{4}$, all in	10
SW $\frac{1}{4}$	11

Petitioner's Exhibit No. 1—(Continued)

In Township 16 North of Range 14 West.

	Section
Lots 19 and 20	7
E $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$	7
W $\frac{1}{2}$ of SW $\frac{1}{4}$	8
NW $\frac{1}{4}$ of NW $\frac{1}{4}$	17
N $\frac{1}{2}$ of Lot 11	18
NE $\frac{1}{4}$, NE $\frac{1}{4}$ of SE $\frac{1}{4}$	18
E $\frac{1}{2}$ of NE $\frac{1}{4}$	19
NW $\frac{1}{4}$	20
S $\frac{1}{2}$ of SW $\frac{1}{4}$	27
E $\frac{1}{2}$ of SW $\frac{1}{4}$, S $\frac{1}{2}$ of SE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$	28
Lot 1	31
Lots 1, 3, 4, 5, and 7,	32
N $\frac{1}{2}$ of N $\frac{1}{2}$	33
E $\frac{1}{2}$ of SE $\frac{1}{4}$	33
NW $\frac{1}{4}$, W $\frac{1}{2}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$	34
N $\frac{1}{2}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$	34

An undivided one-third interest in the following lands situated in Kings County, California, particularly described as follows:

In Township 23 South of Range 16 East.

	Section
NE $\frac{1}{4}$, N $\frac{1}{2}$ of NW $\frac{1}{4}$, SE $\frac{1}{4}$ of NW $\frac{1}{4}$, N $\frac{1}{2}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$, all in	16

All of the following lands situated in Lake County, California, particularly described as follows:

In Township 14 North of Range 6 West, M.D.M.

	Section
S $\frac{1}{2}$ of SW $\frac{1}{4}$	4
N $\frac{1}{2}$ of NW $\frac{1}{4}$	9

Petitioner's Exhibit No. 1—(Continued)

An undivided one-half interest in the following lands situated in Humboldt County, California, particularly described as follows:

In Township 1 South of Range 1 East, H.B.M.		Section
NE $\frac{1}{4}$ of NW $\frac{1}{4}$, W $\frac{1}{2}$ of NE $\frac{1}{4}$, S $\frac{1}{2}$ of SW $\frac{1}{4}$		
SW $\frac{1}{4}$ of SE $\frac{1}{4}$, all in		36
In Township 1 South of Range 2 East, H.B.M.		
Lots 1, 2, 3, and NE $\frac{1}{4}$ of SW $\frac{1}{4}$		31
In Township 2 South of Range 1 East, H.B.M.		
SE $\frac{1}{4}$ of NW $\frac{1}{4}$		13
SE $\frac{1}{4}$ of NE $\frac{1}{4}$, NE $\frac{1}{4}$ of SE $\frac{1}{4}$		14
In Township 2 South of Range 2 East, H.B.M.		
SW $\frac{1}{4}$		6
W $\frac{1}{2}$ of NE $\frac{1}{4}$, E $\frac{1}{2}$ of NW $\frac{1}{4}$		15
S $\frac{1}{2}$ of SE $\frac{1}{4}$		18
NE $\frac{1}{4}$ of NE $\frac{1}{4}$, Lots 3 and 4		19
NW $\frac{1}{4}$ of NW $\frac{1}{4}$		20
E $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$		21
N $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$		22
NE $\frac{1}{4}$		26
SW $\frac{1}{4}$ of NE $\frac{1}{4}$, S $\frac{1}{2}$ of NW $\frac{1}{4}$, S $\frac{1}{2}$		29
SE $\frac{1}{4}$ of NW $\frac{1}{4}$, S $\frac{1}{2}$ of NE $\frac{1}{4}$, N $\frac{1}{2}$ of SW $\frac{1}{4}$		30
In Township 2 South of Range 3 East, H.B.M.		
All that part of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ lying east of South Fork of Eel River		20
All of S $\frac{1}{2}$ of SW $\frac{1}{4}$ lying west of South Fork of Eel River		21
E $\frac{1}{2}$ of NE $\frac{1}{4}$, N $\frac{1}{2}$ of SE $\frac{1}{4}$		29
In Township 3 South of Range 3 East, H.B.M.		
W $\frac{1}{2}$ of W $\frac{1}{2}$ of SE $\frac{1}{4}$		12
In Township 12 North of Range 3 East, H.B.M.		
SW $\frac{1}{4}$ of SW $\frac{1}{4}$		5
SE $\frac{1}{4}$ of SE $\frac{1}{4}$		6

Together with any other real property or interest in real property owned by me in said State of California, excepting my home, 375 Coleridge Avenue, Palo Alto, California.

Petitioner's Exhibit No. 1—(Continued)

An undivided one-half interest in the following lands situated in Coos County, Oregon, particularly described as follows:

In Township 25 South of Range 11 West,

Willamette B. & M.

	Section
Lot 1 or NE $\frac{1}{4}$ of SE $\frac{1}{4}$	22
NW $\frac{1}{4}$ of NW $\frac{1}{4}$	29

In Township 25 South of Range 11 West,

Willamette B. & M.

NW $\frac{1}{4}$ of NW $\frac{1}{4}$	28
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In Township 27 South of Range 13 West,

Willamette B. & M.

All of	22
All of	23
SW $\frac{1}{4}$ of	14
S $\frac{1}{2}$ of NE $\frac{1}{4}$	15
E $\frac{1}{2}$ of SE $\frac{1}{4}$, and SW $\frac{1}{4}$ of SE $\frac{1}{4}$	15

In Township 31 South of Range 11 West,

Willamette B. & M.

SE $\frac{1}{4}$ of NW $\frac{1}{4}$, and NE $\frac{1}{4}$ of SW $\frac{1}{4}$	28
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An undivided one-half interest in the following lands situated in Douglas County, Oregon, particularly described as follows:

In Township 20 South of Range 11 West,

Willamette B. & M.

	Section
N $\frac{1}{2}$ of NE $\frac{1}{4}$, SE $\frac{1}{4}$ of NE $\frac{1}{4}$, E $\frac{1}{2}$ of SE $\frac{1}{4}$	23
SW $\frac{1}{4}$ of NW $\frac{1}{4}$, NW $\frac{1}{4}$ of SW $\frac{1}{4}$, NE $\frac{1}{4}$ of NE $\frac{1}{4}$	26
NE $\frac{1}{4}$ of SE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$, NE $\frac{1}{4}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$, all in	27

Petitioner's Exhibit No. 1—(Continued)

In Township 21 South of Range 11 West,

Willamette B. & M.

	Section
Lots 9, 10 and 11	32

In Township 21 South of Range 12 West.

Willamette B. & M.

NE $\frac{1}{4}$ of NE $\frac{1}{4}$, SE $\frac{1}{4}$ of NE $\frac{1}{4}$, NE $\frac{1}{4}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$, all in	25
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In Township 22 South of Range 11 West.

Willamette B. & M.

Lots 3, 4, and 5	8
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Also right to build, operate and maintain a logging boom to high water mark on the north bank of the Umpqua River, in front and abutting on the descriptions following, to-wit:

Lots 3 - 4 - Sec. 34; Lot 1 - Sec. 33, Township 21 S. 11 West, Willamette B. & M. Also right-of-way for logging, with right to build and maintain a logging boom to high water mark on north bank of Umpqua River in front and abutting Lots 1 and 2, Sec. 31; Lots 2-3-4, Sec. 32, 21 S. 11 W., Douglas County, Oregon.

Together with any other real property or interest in real property owned by me in said State of Oregon.

Recorded: July 1, 1932, Liber 74 of Official Records p. 221 Mendocino Co. California

Recorded: July 15 1932, Book 207 of Deeds p. 295 Humboldt Co., California.

Recorded: Aug 10 1932, Vol 94 of Deeds p. 310 Douglas Co. Oregon

Recorded: Aug 19 1932 Book 117 of Deeds p 395 Coos Co. Oregon

[Endorsed]: T.C.U.S. Filed Sept 14, 1944 [100]

PETITIONER'S EXHIBIT NO. 2

LAST WILL OF MILES STANDISH.

I, Miles Standish, widower, residing at No. 375 Coleridge Street, in the City of Palo Alto, County of Santa Clara, State of California, hereby make, publish and declare this my last Will and Testament, that is to say:

First:—All indebtedness appearing on my books against Allan M. Standish and the ranch owned by him in the County of Santa Clara, State of California, is hereby cancelled, and any such indebtedness shall be no part of my estate.

Second:—I give and bequeath to my sister, Martha A. Standish, the sum of One Hundred Dollars (\$100.00) per month out of my estate, during her lifetime, and in the event that my said estate be distributed prior to her death, I direct that a sufficient amount of securities be set apart from my estate to secure the payment of said legacy of One Hundred Dollars (\$100.00) per month, and that said legacy be a charge thereon, on her death said securities to revert to my son Allan M. Standish and become a part of the trust hereinafter created.

Third:—I give and bequeath to my son and sole heir, Allan M. Standish, the sum of Fifty Thousand Dollars (\$50,000.00) in securities, to be selected out of my estate at the market value thereof.

Fourth:—I give, devise and bequeath to my said son, Allan M. Standish, all of the residue of my property and estate of every kind and nature, and

wherever situate, of which I may die seized or possessed or in which I may have an interest, in trust, nevertheless, for the following uses and purposes, that is to say: To have, hold, manage and control, bargain, sell, transfer, exchange, invest and re-invest the proceeds thereof; to collect the income [101] therefrom, and out of said income pay over one-half thereof to the Trustees of a certain Trust created by agreement in writing, dated the 7th day of January, 1930, made and executed by Miles Standish, the party of the first part therein named, and Miles Standish and Allan M. Standish, his son, the parties of the second part therein named, their successors and survivors, which said trust agreement is hereby referred to and made a part hereof, in trust, nevertheless, for the use and benefit of my grandchildren, Patricia Standish and Beatrice Standish, the children of my said son, Allan M. Standish, and for the use and benefit of any other child or children hereafter born to my said son Allan M. Standish, in equal shares, as provided by the terms of said last named Trust, and to pay over the remaining one-half of said income to my said son Allan M. Standish, in his own right and for his own use and benefit; and as fast as said property is sold and the proceeds thereof collected, pay over and distribute the same in the manner and in the same proportions as said income is to be paid over and distributed; provided, always, said Allan M. Standish is authorized and empowered to retain undivided such proceeds as he deems necessary to properly care for and pay taxes and expenses on the balance of the

unsold property ; provided, in any event, this Trust shall terminate and division of the property shall be made as aforesaid, not later than fifteen (15) years from the date of my death.

Fifth—In the event of the death of my said son, Allan M. Standish, before the termination of said trust, I hereby appoint his wife, Beatrice M. Standish and Miles W. McIntosh, Trustees of said trust in his place and stead, and in the event of the death of said Beatrice M. Standish prior to the termination of said trust, I hereby appoint Lucius Lombard, as Trustee [102] in her place and in the event of the death of said Miles W. McIntosh prior to the termination of said trust, I hereby appoint Clarence Ogden, Trustee, in his place and stead.

I hereby direct that no bond shall be required of my said Trustees, or either of them, as such Trustees.

Sixth:—It is my intention to hereby confer upon said Trustees and their successors, full and complete power and authority to manage and control said trust property and dispose of the same and pay over the proceeds thereof in accordance with the above trust, in their discretion, and without application to any court for permission so to do, and without the order of any court, and I further direct that no purchaser of any property belonging to my estate from said Trustee or Trustees shall be under any obligation to see that proper application is made of the proceeds of such sale or sales by said Trustee or Trustees.

Seventh:—I hereby nominate and appoint my said son, Allan M. Standish, Executor of this my last Will and Testament, and in case of his death, resignation or failure to act, I hereby nominate and appoints his wife, Beatrice M. Standish, executrix of this my last Will and Testament, and direct that no bond or other security be required of them, or either of them, as such Executor and Executrix.

Eighth:—I hereby declare that my wife is dead and I have never remarried. If any person claims to be my wife and contests this Will, then I give and bequeath to such person the sum of One Dollar (\$1.00).

Ninth:—I hereby revoke all former Wills by me made.

In Witness Whereof, I have hereunto set my hand and seal this 7th day of January, 1930.

[Seal]

MILES STANDISH

Witnesses:

H. B. HICKEY

ALICE SHEA

The foregoing instrument, consisting of three (3) pages besides this, was, at the date thereof, by said Miles Standish, signed, in our presence, and in the presence of each of us, and at the time of his subscribing said instrument, he declared that it was his Will, and at his request and in his presence and in the presence of each other, we have subscribed our names thereto as witnesses.

H. B. Hickey residing at No. 260 Lee Street, Oakland in the County of Alameda, State of California.

Alice Shea residing at No. 3564 Seventeenth Street, in the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun 29, 1932. Henry A. Pfister, Clerk. By W. Denker, Deputy.

The foregoing Instrument is a correct copy of the original on file in this office.

Attest May 4 1943

FRANK W. HOGAN

County Clerk and ex-officio Clerk of the Superior Court of the State of California and for the County of Santa Clara.

By ROSALIE EAGER

Deputy

[Endorsed]: T.C.U.S. Filed Sept 19, 1944. [104]

PETITIONER'S EXHIBIT No. 3

In The Superior Court of The State of California,
In and for The County of Santa Clara

No. 18584

In the Matter of the Estate of

MILES STANDISH,

Deceased.

DECREE SETTLING FINAL ACCOUNT AND
REPORT ORDERING FINAL DISTRIBUTION

Comes now Allan M. Standish, Executor of the
Last Will and Testament of Miles Standish, de-

ceased, by R. C. Ogden, Esquire, his attorney, and presents to the court for settlement his Final Account, Report and Petition for Final Distribution, and the same having come on regularly for hearing after due and legal notice thereof, and it appearing from said account that there are charges in favor of said estate since the filing of the last account herein amounting to the sum of \$13,581.58, and that there are credits amounting to the total sum of \$2,932.82 leaving a balance of property in the hands of the Executor belonging to said estate in the total net value of \$10,684.76, and that said balance consists of the securities and property set forth in the account and hereinafter specified at the appraised or cost value thereof in the total sum of \$18,011.46, less cash advancements made by the Executor aggregating the sum of \$7,362.07; and said Executor now proves to the satisfaction of the court that said Account, Report and Petition for Partial Distribution was filed on the 11th day of July, 1942; That on the same day the Clerk of this court appointed the 24th day of July, 1942, as the day for the hearing thereof; that notice of the time and place of said hearing has been duly given in the manner and for the time required by law; and no person appearing to except to or to contest said Account, Report and Petition, the court, after hearing [105] the evidence, finds that said account is correct and is supported by proper vouchers, and being satisfied that all taxes upon the property of said estate including all inheritance taxes which, having become due and payable, have been fully

paid; that notice to creditors has been given as provided by law and that the time for the presentation of claims has expired and that all claims presented and allowed have been satisfied and discharged and that the estate is now in a condition for distribution; that the known assets now in the hands of the Executor and belonging to said estate are as follows:

- (1) 6 shares California Packing Corp. pref.
 - (2) 40 shares Penn. Railway
 - (3) 1 share Atlas Corp. common and 1 share Atlas Corp. pref.
 - (4) 23 shares North American Investors Corp. 6% pref.
 - (5) 30 shares North American Investors Corp. common.
 - (6) 50 shares U. S. and Foreign Securities Co.
 - (7) 703 $\frac{1}{4}$ shares Prudential Development Co.
 - (8) 70 shares Delaware Fund, Inc.
 - (9) \$1000.00 face value American Tel. & Tel. Co. 3% convertible bond.
 - (10) Upright piano and furniture.
 - (11) Claim against estate of Clara M. Lumhard, deceased.
 - (12) Heating plant installed in real estate.
 - (13) Real property in the City of Palo Alto.
- That the Executor has advanced during the

periods covered by his previous accounts to said estate the total sum of \$5,329.83 and has advanced subsequently and during the period covered by his present account the further sum of \$2,032.87, and is entitled to a lien on the assets above described for the total advances heretofore made by him to the said estate in the sum of \$7,362.70;

That the Executor has waived claim for all unpaid compensation due him as Executor of said estate and that the attorney for said estate was and is, as ordinary compensation for his services [106] based upon the total charges reported in the First Account Current hereinbefore filed which total charges were and are \$109,150.83, to the sum of \$1,921.50, and of said amount there has heretofore been paid the sum of \$1,600.00 and that there is now unpaid to said attorney the sum of \$321.50 being the balance due him for said ordinary services; and that upon the payment of said balance by the Executor to said attorney the said Executor shall be entitled to include said payment, together with any other amount necessarily disbursed by him in the closing of this estate in his lien against the above assets; that by the terms of the Last Will and Testament of the decedent which has heretofore been admitted to probate, a continuing bequest of \$100.00 per month was made payable to Martha A. Standish during her lifetime; that the said Martha A. Standish is at the present time of the age of seventy-two years or thereabouts; that under the provisions of said Will, sufficient of said estate shall be set apart to provide

for the payment of said \$100.00 per month to the said Martha A. Standish so long as she lives.

That the said Executor has consented to subordinate his lien upon the assets hereinabove described and specified to the payment of said \$100.00 per month therefrom to the said Martha A. Standish, and that said specified assets are sufficient in amount to provide for the payment of said monthly sum;

That all payments to date under the bequest to Martha A. Standish have been paid;

That pursuant to Order of Partial Distribution hereinabove made, the specific bequest made in said Last Will and Testament to Allan M. Standish, the son of said deceased, in the sum of \$50,000.00 has been paid and satisfied.

That by the provision of said Last Will and Testament of said decedent, all the rest, residue and remainder of the estate [107] now known or which may hereafter be discovered is devised and bequeathed as follows:

An undivided one-half interest therein to Allan M. Standish individually and for his own use and benefit, the other one-half undivided interest therein to Allan M. Standish in trust for the uses and purposes hereinafter more particularly set forth and specified, now therefore,

It Is Ordered, Adjudged and Decreed that the said account be in all respects as the same was rendered and presented for settlement, approved and allowed for settlement.

It Is Further Ordered, Adjudged and Decreed,

that the sum of \$321.50 be paid to the attorney, R. C. Ogden, out of the assets of said estate in payment of the balance due him for ordinary services rendered to the Executor.

It Is Further Ordered, Adjudged and Decreed that the said deceased died testate and left surviving him as his only heir at law his son, Allan M. Standish, now residing near Milpitas, California, and that the following property and no other constitutes the known assets of this estate, and should be set apart and distributed to Allan M. Standish, in trust, for the following uses and purposes:

To have, hold, manage, handle, control, bargain, sell, transfer, exchange without further order of this court, invest and reinvest the proceeds thereof, to collect the income therefrom and out of the income of the proceeds thereof or the proceeds of the sale of any of the said assets, to pay to Martha A. Standish the sum of \$100.00 per month so long as she may live and thereafter to reimburse himself for advances heretofore made by him to the said estate aggregating \$7,362.70, and also for any further advances he may make in paying the balance of attorney's fees and expenses incurred in closing this estate and thereafter and upon [108] the death of said Martha A. Standish, to transfer and set over any balance of said trust fund as provided hereinafter in this order distributing the residue of said estate and any balance of said fund then so remaining shall thereupon become a part of and the same is hereby distributed as a part of the residue of said estate.

It Is Further Ordered, Adjudged and Decreed, That all the rest, residue and remainder of the estate now known or which may hereafter be discovered, including any part remaining in the trust hereinabove last decreed upon the death of Martha A. Standish, is hereby distributed as follows, to wit:

A one-half undivided interest therein to Allan M. Standish, the son of said deceased, individually and for his own use and benefit, and the other one-half undivided interest therein to Allan M. Standish in trust for the following uses and purposes:

To have, hold, manage, handle, control, bargain, sell, transfer, exchange without further order of this court, and to invest and reinvest the proceeds thereof, collect the income therefrom, and to pay and set over to Patricia Standish and Beatrice Standish in equal shares such portion of the income therefrom and such portion of the proceeds of the sale of any property as in the judgment of the said trustee may be so distributed after deducting any amounts necessary to care for and pay the necessary expenses upon the remaining property of said trust, and in any event to set over, transfer and convey to the said Patricia Standish and Beatrice Standish in equal shares all of said one-half undivided interest in said residue which may then remain on the 22nd day of June, 1947.

It Is Further Ordered, Adjudged and Decreed that Patricia Standish and Beatrice Standish are each of them adult persons and each of them has heretofore attained the age of twenty-one years.

That the assets hereinabove distributed in trust to secure [109] the payment of \$100.00 per month to Martha A. Standish during her lifetime are the following assets and no other:

- (1) 6 shares California Packing Corp. pref.
- (2) 40 shares Penn. Railway.
- (3) 1 share Atlas Corp. common and 1 share Atlas Corp. pref.
- (4) 23 shares North American Investors Corp. 6% pref.
- (5) 30 shares North American Investors Corp. common.
- (6) 50 shares U. S. and Foreign Securities Co.
- (7) 703 $\frac{1}{4}$ shares Prudential Development Co.
- (8) 70 shares Delaware Fund, Inc.
- (9) \$1000.00 face value American Tel. & Tel. Co., 3% convertible bond.
- (10) Upright piano and furniture.
- (11) Claim against estate of Clara M. Lumbar, deceased.
- (12) Heating plant installed in real estate.
- (13) Real property in the City of Palo Alto, State of California more particularly described as follows, to wit:

Subdivisions Seven (7) Eight (8) and Nine (9) of Block 18 as designated and delineated upon certain map entitled "Map No. 1 of Seal Addition

to the Town of Palo Alto, which said map is of record in the office of the County Recorder of the County of Santa Clara, State of California, in Book F 3 of Maps, at page 63.

That the assets comprising the residue of said estate and which are hereinabove distributed as part of the residue of said estate includes any right, title or interest which the decedent had at the time of his death or which the estate now has in and to the lands located in the Counties of Mendocino and Humboldt in the State of California and more particularly described in that certain Deed of Trust dated the 17th day of June, 1932, in which Miles Standish the decedent herein, is the first party, and Miles Standish, Allan M. Standish, his son, and Beatrice M. Standish, wife of Allan M. Standish, are therein called the trustees, and which deed is of record in the office of the County Recorder of Mendocino County, in liber 74 of Official Records, page 221 etseq., and is also of record in the [110] office of the County Recorder of Humboldt County, in book 207 of Deeds page 295.

Dated: July 24th, 1942.

R. R. SYER

Judge of the Superior Court
Aforesaid.

The foregoing Instrument is a correct copy of the original on file in this office.

Attest Jan. 25, 1944.

FRANK W. HOGAN,
County Clerk and ex-officio Clerk of the Superior
Court of the State of California and for the
County of Santa Clara.

By ORTENZIA BRADY
Deputy.

[Endorsed]: Filed July 24, 1942. Frank W.
Hogan, Clerk. By T. R. Bonetti, Deputy.

[Endorsed]: T.C.U.S. Filed Sep. 19, 1944. [111]

PETITIONER'S EXHIBIT No. 4

San Francisco, California
October 5, 1933

Internal Revenue Agent in Charge
San Francisco, California

Valuation Report

Re: Estate of Miles Standish
Palo Alto, California

Date of Death: June 22, 1932

The above taxpayer owned timberlands and stock in timber holding companies located in Mendocino and Humboldt Counties, California.

The timber holdings of the different ownerships are rather scattered and in many cases quite inaccessible.

After an examination of the properties and a conference with the taxpayers representative on October 3, 1933 the following values were agreed upon as of June 22, 1932.

Valuations as of June 22nd, 1932

Land and Log Company

Timber Redwood	16000	M	@	0.60	\$ 9,600.00
Land—Timberland	959	Acres	@	0.50	479.50
Grazing land	112542	Acres	@	1.00	1,125.42
					<hr/>
Total.....					\$11,204.92
Undivided 1/3 interest.....					\$ 3,734.97

Standish and Hickey & Connolly

Grazing Land	320	Acres	@	1.00	\$ 320.00
Undivided 1/3 interest.....					\$ 106.66

Prudential Development Co.

Timber Redwood	110000	M	@	0.60	\$66,000.00
Land Timberland	4582	Acres	@	0.50	2,291.00
					<hr/>
Total.....					\$68,291.00

There are 36,446 shares of stock outstanding in this company of which the taxpayer owns $5272\frac{7}{8}$ shares.

Value per share \$1,874

North Coast Development Co.

Timber Redwood	300000	M	@	0.60	180,000.00
Land Timberland	16530	Acres	@	0.50	8,265.00
					<hr/>
Total.....					\$188,265.00

There are 2000 shares of stock outstanding in this company of which the taxpayer owns 100 shares.

Value per share \$94.13

South Eel Trust

Mendocino County

Timber Redwood	16000	M	@	0.75	\$12,000.00
Redwood	18000	M	@	0.60	10,800.00
Land Timberland	1332	Acres	@	0.50	666.00

Total.....\$23,466.00

Humboldt County

Timber Redwood	31000	M	@	0.60	\$18,600.00
Land Timberland	1120	Acres	@	0.50	560.00
Grazing Land	4480	Acres	@	1.00	4,480.00

Total.....\$23,640.00

Grand Total.....\$47,106.00

There are 960 shares outstanding of which the taxpayer owns 240 shares.

Value per share \$49.07

Standish and Hickey

Mendocino County

Timber Redwood	35000	M	@	0.75	\$26,250.00
Redwood	90000	M	@	0.60	54,000.00
Land Timberland	7565	Acres	@	0.50	3,782.50
Grazing Land	2627	Acres	@	1.00	2,627.00

Total.....\$86,659.50

Humboldt County

Timber Redwood	35000	M	@	0.60	\$21,000.00
Land Timberland	1280	Acres	@	0.50	640.00
Grazing Land	1160	Acres	@	1.00	1,160.00

Total.....\$22,800.00

Grand Total.....\$109,459.50

Undivided $\frac{1}{2}$ interest.....\$ 54,729.75

Est. Miles Standish

Coos County Oregon Lands

Reference is made to report by Internal Revenue Agent Tom R. Wilson dated July 11, 1933, with reference to the Coos County Lands.

Lands	Suitable for agriculture.....	520 Acres	
	Timberlands	400 Acres	
	Cut-over suitable for reforestation	1000 Acres	
			1,920
	Total value of lands		\$16,000.00
Timber	9045 M ft. of Douglas Fir @ 0.50.....		4,522.50
			Total.....\$20,522.50
	Value of decedent's 1/2 interest.....		\$10,261.25

The value of this property is approved and accepted by the taxpayer.

Douglas County Oregon Lands

Reference is made to the report by Internal Revenue Agent Tom R. Wilson, dated May 19, 1933, in which the property is valued at \$13,280.50.

There was considerable confusion in the valuation of this property as it was thought that the Douglas County property was all that was claimed in the returned value of \$14,567.50 while the Coos County property should also have been included.

In view of the above the values of the Douglas County property are recommended as follows to bring them in line with the other values in this case.

Fir, cedar and spruce.....	8187	M	@	\$1.00	\$8,187.00
Hemlock	2000	M	@	0.25	500.00
Land	514	A	@	1.00	514.00
					Total.....\$9,201.00

The 9201.00 represents the taxpayer's interest in this property.

In the conference with the taxpayer's representative on October 3, 1933, all of the above values were accepted as a basis of value for the decedent's estate.

Summary of Decedent's Timber Property

Designation	Value
Land and Log Company 1/3 interest.....	\$ 3,734.97
Standish and Hickey & Connolly 1/3 interest.....	106.66
Prudential Development Co.	
5272 7/8 Shares @ \$1,874	9,881.37
North Coast Development Co.	
100 Shares @ \$4.13	9,413.00
South Eel Trust	
240 Shares @ 49.07	11,776.80
Standish and Hickey 1/2 interest.....	54,729.75
Coos County Oregon Land.....	10,261.25
Douglas County Oregon Land.....	9,201.00
Total.....	\$109,104.80

Recommended By

E. T. F. WOHLBERG

Engineer Revenue Agent.

ACS

[Endorsed]: T.C.U.S. Filed Sept. 19, 1944.

PETITIONER'S EXHIBIT No. 5

Douglas County
Roseburg, Oregon

August 14, 1943

Mr. Louis Janin
1120 Mills Tower
San Francisco, Calif.Re: Standish & Hickey
Crocker Bldg.
San Francisco, Calif.

Dear Sir:

In reply to your letter of recent date in regard
to the property in Douglas County formerly owned

by the above named firm, the county took deed to all the various parcels of land mentioned on June 2, 1941.

Very respectfully
O. T. CARTER,
Sheriff, pro tem.

By H. C. DARBY,
H. C. Darby, Deputy

HCD:h [117]

August 11, 1943

Office of the Sheriff of Douglas County
Roseburg, Oregon

Re: Standish & Hickey, Crocker Bldg.
San Francisco, California

Dear Sirs:

On January 21, 1942 your office wrote a letter to Standish & Hickey advising that the County had taken a deed to their property in Douglas County. This property consisted of parcels in Sections 23, 26 and 27 of Township 20, Range 11 West W B & M, in Section 32 of Township 21, Range 11 West W B & M, in Section 25 of Township 21, Range 12 West W B & M and in Section 8 of Township 22, Range 11 West W B & M.

Can you advise me as to the date on which this deed was taken and also whether the properties listed above were all included in said deed or deeds. This information is desired in connection with an income tax proceeding which I am handling on

124 *A. M. and Beatrice M. Standish vs.*

behalf of Mr. Standish. A prompt reply will be greatly appreciated.

Very truly yours,
LOUIS JANIN

LJ:FG

[Endorsed]: T.C.U.S. Filed Sep. 19, 1944. [118]

PETITIONER'S EXHIBIT No. 6

Office of
Wm. F. Howell, Sheriff
Coos County
Coquille, Oregon

August 17, 1943

Louis Janin
Adolphus E. Graupner
1120 Mills Tower
San Francisco, California

Dear Sirs:

In answer to your letter of August 11, 1943, the property taken over by the County in June of 1941 is as follows:

NW $\frac{1}{4}$	Sec. 23-27-13
NW $\frac{1}{4}$ NW $\frac{1}{4}$	28-26-11
SW $\frac{1}{4}$	14-27-13
S $\frac{1}{2}$ NE $\frac{1}{4}$ -NE $\frac{1}{4}$ SE $\frac{1}{4}$	
S $\frac{1}{2}$ SE $\frac{1}{4}$	15-27-13
Lot 5	22-25-11

S $\frac{1}{2}$ NW $\frac{1}{4}$ -N $\frac{1}{2}$ SW $\frac{1}{4}$ 28-31-11

SE $\frac{1}{4}$ 22-27-13

Enclosed are tax statements of that has not gone to the County.

Yours truly,

WM. F. HOWELL,
Sheriff

By MURIEL HERMAN,
Tax Department

WFH:mh

Enc. #3

[Endorsed]: T.C.U.S. Filed Sep. 19, 1944. [119]

COOS COUNTY

COQUILLE OREGON

1941

STATEMENT OF TAXES ON HEREIN DESCRIBED PROPERTY WITH INTEREST
COMPUTED TO THE 25 DAY OF

MAKE REMITTANCES PAYABLE TO:

William R. Howell,
SHERIFF AND TAX COLLECTOR, COQUILLE OREGON

THE TAX COURT OF THE U.S.
DIV. 9 DOCKET 34-1
ADMITTED EVIDENCE

SEP 11 1941

PETITIONER'S
EXHIBIT
RESPONDENT'S

✓ 162 1/2 NW 1/4 Sec 22-27-13
2 1/2 NW 1/4 Sec 20-27-13
1 1/2 NW 1/4 Sec 23-27-13

VALU				
	Taxable Year 19	41	8140	
	Interest		383	
	Taxable Year 19	42	8140	7840
	Interest		190	1040
	Taxable Year 19	43 Bal	1510	8500
	Interest		1228	1128
	Taxable Year 19	44 Bal	8004	8004
	Interest		2267	2267
	Taxable Year 19	45 Bal	8004	8004
	Interest		2408	2408
	Taxable Year 19	46 Bal		
	Interest			
	Taxable Year 19	47 Bal	6048	6048
	Interest		3165	3165
	Taxable Year 19	48	76.00	
	Interest			
	Taxable Year 19	49	6384	
	Interest			
	Taxable Year 19	50	4467	2367
	Interest		3642	1846
	Taxable Year 19	51 Bal	1154	1154
	Interest		792	792
	Taxable Year 19			
	Interest		888.66	567.13
	TOTAL			

PLEASE RETURN WITH REMITTANCE

In the United States Circuit Court of Appeals for
the Ninth Circuit

The Tax Court of U. S.

Docket #3950

In the Matter of:

BEATRICE M. STANDISH,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent

The Tax Court of U. S.

Docket #3949

In the Matter of:

A. M. STANDISH

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent

ORDER FOR CONSOLIDATION OF THE
RECORD

Upon the consideration of the Motion filed herein
by Counsel for the Petitioners of review in the above
entitled proceedings, moving the Court to consoli-
date said proceedings for purposes of record, brief-

ing, hearing and decision and for other purposes;
It Is This 21st day of September, 1945:

Ordered That said Motion be and it is hereby granted. And it is further ordered that a certified copy of [121] the Motion and this Order be transmitted by the Clerk of this Court to the Clerk of The Tax Court of the United States.

CLIFTON MATHEWS

United States Circuit Judge

[Endorsed]: Order, ect. Filed Sept. 21, 1945.

A True Copy. Attest: September 21, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk.

By /s/ FRANK H. SCHMID
Deputy Clerk.

[Endorsed]: T.C.U.S. Filed Sept. 26, 1945.

The Tax Court of the United States

Docket #3950

In the Matter of:

BEATRICE M. STANDISH,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket #3949

In the Matter of:

A. M. STANDISH,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

In compliance with the provisions of Paragraph (a) of Rule 75 of Federal Rules of Civil Procedure (Title 28, Sec. 723 (c) U.S.C.A.) as made applicable to review on decision of The Tax Court of the United States by Rule 30 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the above named petitioners hereby designate the portions of the record, proceedings and evidence to be contained in the consolidated record on review of

the above entitled proceedings prepared under one cover as follows:

1. Docket entries of the proceedings before The Tax Court of the United States. (In each proceeding) [123]

2. Petitions filed with The Tax Court for the redetermination of deficiencies, (one in each of the proceedings.)

3. Answers to said petitions.

4. Memorandum opinion of date March 19, 1945 by The Tax Court of the United States.

5. Decisions of The Tax Court of the United States entered on June 20, 1945 (one in each of said proceedings.)

6. Petitions for review of decision of The Tax Court by the United States Circuit Court of Appeals for the Ninth Circuit filed as of September 17, 1945, (one in each of said proceedings.)

7. Notices of filing of petitions for review and affidavits of service of said notices and copies of said petitions.

8. Orders, if any, which may be obtained enlarging time for preparation, transmission and delivery of the record.

9. Such portion of the transcript of evidence stenographically reported at the hearing as is set forth in Exhibit "A" to this designation of contents.

10. Exhibits admitted into evidence as set forth

in the said portion of the reporter's transcript, that is to say: Petitioners' exhibits 1 to 7 both inclusive.

11. Designation of contents of record on appeal, together with affidavit of service thereof.

12. Statement of points on which petitioner intends to rely; together with affidavit of service thereof. (One in each of said proceedings.)

13. Order of the United States Circuit Court of Appeals for the Ninth Circuit, for consolidation of the record.

R. CLARENCE OGDEN

Attorney for Petitioners.

State of California

City and County of San Francisco—ss:

Florence Easley, being duly sworn deposes and says:

That she is a citizen of the United States over the age of 21 years and not a party to the above entitled proceedings;

That on the 25th day of September, 1945 she deposited in the United States Post Office of San Francisco, California, addressed to J. P. Wenchel, Chief Counsel for the Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C. a true copy of the annexed Designation of Contents of Record on Appeal; that said copy of Designation, together with copy of this affidavit, together with copies of Statement of Points on which Appellants Intend to Rely, previously filed herein, were enclosed in an envelope addressed as

aforesaid and deposited in the Post Office of San Francisco, California, with postage prepaid thereon.

FLORENCE EASLEY

Subscribed and sworn to before me this 25th day of September, 1945.

[Seal] LULU P. LOVELAND

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires August 27, 1947.

[Endorsed]: T.C.U.S. Filed Sept. 27, 1945. [126]

[Title of Tax Court and Causes—Nos. 3949-3950.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 126, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 10th day of Oct. 1945.

[Seal] B. D. GAMBLE

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11159. United States Circuit Court of Appeals for the Ninth Circuit. A. M. Standish, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and Beatrice M. Standish, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record Upon Petitions to Review Decisions of The Tax Court of the United States.

Filed October 15, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11159

In the Matter of:

BEATRICE M. STANDISH,

Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

In the Matter of:

A. M. STANDISH,

Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

STATEMENT OF POINTS ON WHICH PETI-
TIONERS INTEND TO RELY ON APPEAL
AND DESIGNATION OF PARTS OF REC-
ORD BELIEVED NECESSARY

Come now the petitioners and appellants herein-
above named and in compliance with Rule 19 of
the above entitled Court, respectfully state:

That they hereby adopt and repeat the "State-
ments of Points on Which Petitioner Intends to
Rely" heretofore filed by each of the petitioners in
the Tax Court of the United States, which "State-
ment of Points on Which Petitioner Intends to
Rely" and both of them are part of the records
transmitted by the Clerk of the Tax Court of the

United States to the Clerk of this Court; petitioners and each of them hereby makes a statement of the points on which each of the petitioners intends to rely on this appeal and for that purpose adopts the statement thereof as set forth in said "Statement of Points on Which Petitioner Intends to Rely" filed as aforesaid in the Tax Court of the United States.

Petitioners further designate the parts of the record and all thereof which have been transmitted by the Clerk of the Tax Court of the United States to the Clerk of this Court as parts of the record which she and he think necessary for the consideration of the points relied upon.

Respectfully submitted this 24th day of October, 1945.

R. CLARENCE OGDEN

Attorney for Petitioners and
Appellants

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed October 24, 1945. Paul P. O'Brien, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

A. M. STANDISH,	<i>Petitioner,</i>
vs.	
COMMISSIONER OF INTERNAL REVENUE,	<i>Respondent,</i>
and	
BEATRICE M. STANDISH,	<i>Petitioner,</i>
vs.	
COMMISSIONER OF INTERNAL REVENUE,	<i>Respondent.</i>

Brief for Petitioners

R. CLARENCE OGDEN,
525 Standard Oil Bldg.,
San Francisco 4, California,
Attorney for Petitioners.

FILED

JAN 23 1946

PAUL P. O'BRIEN,
CLERK

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United States
Circuit Court of Appeals
For the Ninth Circuit

A. M. STANDISH,	<i>Petitioner,</i>
vs.	
COMMISSIONER OF INTERNAL REVENUE,	<i>Respondent,</i>
and	
BEATRICE M. STANDISH,	<i>Petitioner,</i>
vs.	
COMMISSIONER OF INTERNAL REVENUE.	<i>Respondent.</i>

Brief for Petitioners

JURISDICTION

This is a consolidated appeal taken from two decisions entered by the Tax Court of the United States based upon a single set of findings of fact and opinion promulgated by the said Tax Court of the United States on March 19, 1945, and applicable to each of the proceedings in which the decisions were subsequently entered on June 20, 1945.

The proceedings in the Tax Court of the United States were initiated by petitions for the redetermination of deficiencies in the income taxes of the respective petitioners for the years 1940 and 1941 as set forth by the Commissioner of Internal Revenue in his notices of deficiency dated November 8, 1943, and mailed on that date to the respective petitioners.

The petitioners, both of whom reside at Milpitas, Santa Clara County, California, and filed their income tax returns with the Collector of Internal Revenue, First District of California, filed their respective petitions with the Tax Court of the United States on February 2, 1944, pursuant to Section 272 of the Internal Revenue Code of the United States. The Commissioner filed his answers to the respective petitions on February 26, 1944, and thereafter on September 19, 1944, the two proceedings were ordered consolidated and were heard by the Tax Court of the United States on the same evidence.

On March 19, 1945, Findings of Fact and Opinion was promulgated and entered by that Court and thereafter and on June 20, 1945, Decisions in the respective proceedings were entered.

Within three months thereafter and on September 17, 1945, the petitioners served and filed with the Clerk of the Tax Court of the United States their respective petitions for review by the United States Circuit Court of Appeals together with assignments of error pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The petitions for the redetermination of deficiencies appear in the record:

Petition of A. M. Standish—Trans. of Record, p. 5 et seq.

Petition of Beatrice M. Standish—Trans. of Record, p. 21 et seq.

The answers filed by the Commissioner appear:

Answer to petition of A. M. Standish—Trans. of Record, p. 19 et seq.

Answer to petition of Beatrice M. Standish—Trans. of Record, p. 34 et seq.

The respective petitions for review by this Court appear:

Petition of A. M. Standish—Trans. of Record, p. 51 et seq.

Petition of Beatrice M. Standish—Trans. of Record, p. 61 et seq.

STATEMENT OF THE CASE

During the years 1940 and 1941, these petitioners were copartners and filed with the Collector of Internal Revenue at San Francisco, California, partnership income tax returns for the respective years as well as their respective individual income tax returns. This consolidated proceeding on review involves only the year 1941 and but one item claimed as a deduction in income for that year.

In 1943 the Commissioner of Internal Revenue assessed deficiency taxes against each petitioner and as

one of the adjustments resulting in the deficiencies for the year 1941 charged back to income of the partnership: "3. Fiduciary loss—\$10,512.92" and allocated one-half of that resulting increase to the income of each of these petitioners for that year. This adjustment was explained in the notice as follows:

"3. The loss of \$10,512.92 claimed as sustained by the Miles Standish Trust upon the loss of certain timber property because of failure to pay taxes owing to the State of Oregon is disallowed on the ground that any loss sustained is deductible by the Estate of Miles Standish, Deceased, or trust created by him, either prior to death or in his will."

The timber lands referred to in the last quoted paragraph are located in Coos and Douglas Counties in the State of Oregon. During his lifetime one Miles Standish owned an undivided one-half interest in those lands. Miles Standish died on June 22, 1932, and, following his death, the value of his one-half interest in said lands and timber at the date of his death, was appraised for purpose of fixing the amount of estate tax due thereon by the Commissioner of Internal Revenue as follows:

Douglas County property

Fir, cedar and spruce at \$1.00 per	
M board feet.....	\$ 8,187.00
Hemlock at 25c per M board feet	500.00
514 acres of land at \$1.00 per acre	514.00

Total value of decedent's one-	
half interest	\$ 9,201.00

Coos County property

Lands suitable for agri-

culture 520 acres

Timber lands 400 acres

Cut-over lands suitable

for reforestation 1000 acres

Total.....1920 acres \$16,000.00

Timber at 50c per M board feet..... 4,522.50

Total..... \$20,522.50

Value of decedent's half interest \$10,261.25

The total values of the Coos County properties were arrived at by giving a unit value of \$28.00 per acre for the 520 acres suitable for agriculture and \$1440.00 or approximately \$1.00 per acre for the remaining 1400 acres located in Coos County.

In the year 1941, all of the lands and timber formerly owned by Miles Standish, located in the County of Douglas, State of Oregon, were sold by the sheriff of that county for the non-payment of taxes assessed thereupon by the State of Oregon.

In the same year the sheriff of Coos County, State of Oregon, sold all of the lands formerly belonging to Miles Standish, located in his county above referred to as suitable for agriculture and all the remaining timber and lands with the exception of certain thereof which had been disposed of prior to the year 1941, for \$3521.95 for Miles Standish's one-half interest and also

lands suitable for reforestation which were not sold and which had a value as above determined, of \$500.00.

On June 17, 1932, five days prior to his death, Miles Standish signed and delivered a certain indenture by which he attempted to transfer to himself, his son, Allan M. Standish, and Beatrice M. Standish, as trustees, various tracts of timber land more particularly described in said indenture and which included his one-half interest in the said timber lands located in Coos and Douglas Counties, Oregon. That indenture provided that the said trustees were to hold the said lands in trust however, for the uses and purposes therein specified. The grantor reserved the income and/or proceeds from all of the said properties to himself during his lifetime and also reserved to himself the right to revoke the said transfer at any time prior to his death.

The pertinent provisions of that indenture are:

“Fourth:—The property herein referred to shall be held by the Trustees and during the lifetime of the Grantor, the net income and proceeds therefrom shall be paid to the Grantor in quarterly installments as nearly as may be practicable; and upon the death of the Grantor said income and proceeds shall be paid as follows:

(a) Fifty-one per cent (51%) of said net income shall be paid to Allan M. Standish;

(b) Seventeen per cent (17%) of said net income shall be paid to Beatrice M. Standish, wife of Allan M. Standish;

(c) Sixteen per cent (16%) of said net income shall be paid to Patricia Standish;

(d) Sixteen per cent (16%) of said income shall be paid to Beatrice Standish.

“This division of the net proceeds and income from the said property shall continue until the youngest grandchild shall have attained the age of thirty (30) years, when the Trustees shall convey to the Beneficiaries then living, all of the property then remaining in this trust, in such proportion as their respective interests are indicated by the percentages upon which the income has been paid to them, and the trust shall cease.

“Fifth:—As incidental to the trust herein created the Trustees shall have full power and authority, in their discretion, to manage, control, sell, transfer, mortgage, convey, lease, exchange, and otherwise deal with, and dispose of, any or all of the trust estate, and to execute any instruments necessary for the exercise of such powers, and should corporate stock come into said estate to make any and all transfers thereof into their name as in any case may be necessary or proper for and in the administration of the trust; to collect rents or other incomes; to collect at maturity any and all securities, to invest and re-invest the proceeds of the sale of any property, real or personal, and the property in which the proceeds of sales or exchanges may be invested, or property received in exchange, may be again sold or re-exchanged as often as the Trustees shall see fit and the proceeds re-invested; and the Trustees shall also have the power to pay all taxes, assessments and charges

levied upon or against the property held in trust, employ clerical or other assistance, and also legal counsel whenever in their judgment it is necessary so to do. (Transcript of the Record, pp. 93-94.)

. . .

“Eighth:—In the event that I have any additional grandchild or grandchildren living at the time of my death, the shares of Patricia and Beatrice Standish shall be proportionately reduced so that such additional grandchild or grandchildren shall share equally with them.

“Ninth:—In the event that any grandchild shall die prior to the time that the respective beneficial interest due said grandchild shall become payable in whole or part as herein provided, then the invested beneficial interest due said grandchild shall revert as follows:

1. If said deceased grandchild shall leave lawful heir of his or her body then such legal heir or heirs shall become the beneficiary in the place and stead of his or her parent by right of representation.

2. In the event any deceased grandchild leaves no legal heirs, then the beneficial interest to which said grandchild would otherwise be entitled shall revert to the equal benefit of the surviving grandchildren, the legal issue of any deceased grandchild to take by representation.

3. In the event that all of said grandchildren die without legal issue prior to the vesting of all of said trust estate, so much as remains shall be paid or delivered to any heirs of the first party under the law of succession as the same exists at

the date of this instrument.” (Transcript of the Record, pp. 95-96.)

Upon the death of Miles Standish an instrument was produced dated January 7, 1930, which was later admitted to probate in the Superior Court of the State of California, in and for the County of Santa Clara, as the last will and testament of Miles Standish, Deceased. This last will, after making certain specific bequests with which we are not here concerned, provided as to the residue of any estate or property owned by the decedent at the time of his death as follows:

“Fourth:—I give, devise and bequeath to my said son, Allan M. Standish, all of the residue of my property and estate of every kind and nature, and wherever situate, of which I may die seized or possessed or in which I may have an interest, in trust, nevertheless, for the following uses and purposes, that is to say: To have, hold, manage and control, bargain, sell, transfer, exchange, invest and reinvest the proceeds thereof; to collect the income therefrom, and out of said income pay over one-half thereof to the Trustees of a certain Trust created by agreement in writing, dated the 7th day of January, 1930, made and executed by Miles Standish, the party of the first part therein named, and Miles Standish and Allan M. Standish, his son, the parties of the second part therein named, their successors and survivors, which said trust agreement is hereby referred to and made a part hereof, in trust, nevertheless, for the use and benefit of my grandchildren, Patricia Standish and Beatrice

Standish, the children of my said son, Allan M. Standish, and for the use and benefit of any other child or children hereafter born to my said son Allan M. Standish, in equal shares, as provided by the terms of said last named Trust, and to pay over the remaining one-half of said income to my said son Allan M. Standish, in his own right and for his own use and benefit; and as fast as said property is sold and the proceeds thereof collected, pay over and distribute the same in the manner and in the same proportions as said income is to be paid over and distributed." (Transcript of the Record, pp. 105 to 106.)

Following the death of Miles Standish no probate proceedings were commenced in the State of Oregon. However, Allan M. Standish and Beatrice M. Standish as the survivors of the three grantees and trustees named in the indenture dated June 17, 1932, and above quoted from, assuming that said indenture had effectuated a valid transfer of one-half interest in the Oregon lands, presumed to act as such trustees and filed each year with the Collector of Internal Revenue fiduciary returns in which the proceeds of a few sales were reported as the proceeds of sales made by them as trustees under the instrument which they assumed had created a valid trust. The proceeds of these sales aggregated during the eight years prior to 1941 the sum of \$3521.95.

The administration proceedings over the estate of Miles Standish, Deceased, located in the State of California, were continued until July 24, 1942, at which

time the court construed the provisions of the last will of Miles Standish above quoted and distributed the residue of the California estate as follows:

“It Is Further Ordered, Adjudged and Decreed, That all the rest, residue and remainder of the estate now known or which may hereafter be discovered, including any part remaining in the trust hereinabove last decreed upon the death of Martha A. Standish, is hereby distributed as follows, to wit:

A one-half undivided interest therein to Allan M. Standish, the son of said deceased, individually and for his own use and benefit, and the other one-half undivided interest therein to Allan M. Standish in trust for the following uses and purposes:

To have, hold, manage, handle, control, bargain, sell, transfer, exchange without further order of this court, and to invest and reinvest the proceeds thereof, collect the income therefrom, and to pay and set over to Patricia Standish and Beatrice Standish in equal shares such portion of the income therefrom and such portion of the proceeds of the sale of any property as in the judgment of the said trustee may be so distributed after deducting any amounts necessary to care for and pay the necessary expenses upon the remaining property of said trust, and in any event to set over, transfer and convey to the said Patricia Standish and Beatrice Standish in equal shares all of said one-half undivided interest in said residue which may then remain on the 22nd day of June, 1947.”
(Transcript of the Record, page 115.)

In December, 1935, the petitioners here entered into a partnership agreement by the provisions of which each set over to the other a one-half interest in everything either of them owned whether the title thereto was originally acquired by inheritance or otherwise and a copy of this partnership agreement was filed with the Treasury Department of the United States and has been acted on in connection with income tax returns since that time.

QUESTIONS INVOLVED

Under the facts of this case, we submit that the questions involved are as follows:

1. By whom was the title and right of possession to the one-half interest in the Oregon lands formerly owned by Miles Standish held at the time those properties were lost by tax sale in the year 1941?

This question involves the following:

(a) Did the so-called "Deed of Trust" (Petitioners' Exhibit No. 1) effectuate a valid transfer *inter vivos* in trust or was that instrument void for the reason the provisions thereof violated the rule against perpetuities?

(b) If, as we contend, the last mentioned "Deed of Trust" was ineffectual as a transfer, then, was the interest in real property located in the State of Oregon an asset held by the Executor of the estate of Miles Standish, Deceased, in the probate proceedings then

pending in the Superior Court of the State of California, in and for the County of Santa Clara?

(c) In the absence of any probate proceedings brought in the State of Oregon or the appointment of any executor or administrator under the laws of that State, did the title to Miles Standish's interest in real property situate in that State vest in the devisees immediately upon his death as directed by the provisions of the last will of Miles Standish, Deceased, applicable to the residue of the decedent's property?

(d) If, as we contend, title to the Oregon real property did vest in the residuary devisee or devisees, who are those devisees:

(1) Allan M. Standish as trustee for the benefit of himself and others, or

(2) Allan M. Standish individually as to a one-half interest and Allan M. Standish as trustee for the benefit of others as to the other one-half interest?

Those questions are presented:

1. By the explanation assigned by the Commissioner in his notice of deficiency which we have quoted above. (Transcript of Record, pp. 16-17.)

2. By the petitions for redetermination of the deficiency filed with the Tax Court of the United States in both of which it is set forth that the Commissioner erred:

“C. For the year 1941 the Commissioner erred in increasing petitioner's income by \$5,256.46 by

disallowing the loss of \$10,512.92 claimed as a deduction on the partnership return of petitioner and his wife, Beatrice M. Standish, with respect to the loss of certain timber properties in the State of Oregon from abandonment and nonpayment of taxes, and particularly erred in determining that 'any loss sustained is deductible by the estate of Miles Standish, deceased, or the trust created by him, either prior to death or in his will.' The last mentioned determination by the Commissioner is erroneous because the 'trust' to which this property was 'conveyed' was completely void, and because no probate proceedings having ever been commenced in the State of Oregon, the timber property located in that State, and the title thereto, passed to, and was vested in, A. M. Standish immediately upon the death of Miles Standish, and the loss sustained (now believed to be \$7,471.80, rather than \$10,512.92 claimed on the return) was sustained by the partnership as the successor in interest to said timber properties of the said Allan M. Standish, rather than by any estate or trust of, or created by Miles Standish." (Transcript of Record, pp. 6-7 and 22-23.)

3. By the answer of the Commissioner denying the last quoted allegation.

4. By the opinion of the Tax Court of the United States promulgated in the consolidated proceedings in which it is found or determined with respect to the instrument dated June 17, 1932:

"We are of the opinion that by the terms of the trust, under the law, there was also, as of that

date, an immediate vesting of interest in the *corpus* or remainder. The fact that as of the date of the trust there was a possibility of divesting of the estates of the grandchildren and a redistribution to accommodate an after-born child does not affect the vesting or make it contingent. It is our opinion that, looking to the four corners of the trust, the grantor contemplated immediate vesting of interest of the *corpus* of the property in the several beneficiaries.

The consequence of our ruling that the property had vested as of the date of the grantor's death is that petitioners are not entitled to deduct the loss sustained on the Coos County and Douglas County properties." (Transcript of the Record, p. 48.)

SPECIFICATION OF ERRORS

1. The Tax Court of the United States should have determined that the trust instrument dated June 17, 1932, signed by Miles Standish, by its provisions fixing the term thereof for a longer period of time than lives in being and twenty-one years plus the period of gestation, violated the rule against perpetuities as said rule is applicable in the States of California and Oregon and that therefor the said instrument was void and that no transfer of title to any of the lands therein described was effectuated *inter vivos*.

2. That the Tax Court of the United States should have determined that a one-half interest in the testator's one-half interest in the Oregon lands vested immediately upon the testator's death under the resi-

due clause of his last will in A. M. Standish as his individual property free of any trust.

3. That the Tax Court of the United States should have determined that the one-fourth interest acquired by A. M. Standish in the Oregon lands as his individual property passed to the partnership of A. M. Standish and Beatrice M. Standish in December, 1935, and that the loss sustained from the abandonment and non-payment of taxes upon the said lands in the year 1941 is deductible from the partnership income as set forth in the partnership return of these petitioners for the year 1941.

4. That the Tax Court of the United States should have determined in view of its findings that "the loss to the Standish interests was \$15,440.31, that the partnership sustained one-half of that loss in 1941 or \$7,720.15 and that such loss is a proper deduction from the partnership income for said year of 1941.

ARGUMENT

I.

Inter-Vivos Trust Void

"To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary a legal purpose and a legal term. While equity will in certain instances make good the absence of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal, the ~~first~~ itself must fail." (Italics ours.) ~~Trust~~

In re Walkerley, 108 Cal. 627, 650.

“The rule against perpetuities allows the postponement of the vesting of an estate or interest for the period of lives in being and twenty-one years and the period of gestation.”

21 R. C. L., page 291, and cases there cited.

That rule is the one governing in Oregon.

Imbrie vs. Hartrampf, 100 Oregon 589, 198 Pac. 521.

“The rule against perpetuities is not a rule of construction but a positive mandate of law to be obeyed irrespective of the question of intention. The proper procedure is to determine the true construction of the will or deed involved, just as if there was no such thing in existence as the rule against perpetuities, and then to apply the rule rigorously, in complete disregard of the wishes and intentions of the testator or grantor.”

21 R. C. L., page 294.

The indenture here under consideration (Petitioner's Exhibit No. 1—Trans. of Record, p. 91), was made on June 17, 1932, while the grantor was alive. It purported to convey the legal title to named Trustees in trust for grandchildren who might thereafter at any time before the grantor's death, be born. It provided that the legal title to the properties should be held in trust until the youngest grandchild, including those yet unborn, reached the age of thirty years. Legal titles to the lands or the proceeds from the sale thereof might not vest in the beneficiaries until an

unborn child, so far as was known at the time the indenture was signed and delivered, reached the age of thirty years. Indeed, at the time the instrument became effective, if at all, it was impossible to know in whom the *corpus* of the trust fund would ultimately vest.

It is true, that as events subsequently developed, the grantor died five days after executing the indenture and that the only grandchildren then living were the two that were alive when the indenture was signed. But that is immaterial.

“In applying the rule against perpetuities to future estates created by conveyances *inter vivos* the period allowed is computed as commencing when the conveyance takes effect.”

21 R. C. L., page 294;

Notes: 49 A. S. R. 119;

21 Eng. Rul. Cas. 131.

The instrument here in question effected a transfer *inter vivos*, or none at all.

“It is fundamental that, while possession of enjoyment of an estate may be deferred, a deed, to be operative, must pass a present interest.”

8 R. C. L., 930 and cases there cited;

Annotation 1—L. R. A. (N. S.) 315.

The instrument specifically provides:

“In the event any grandchild shall die prior to the time that the respective beneficial interest

due said grandchild shall become payable in whole or in part as herein provided, then the invested beneficial interest due said grandchild shall revert as follows:

1. If said deceased grandchild shall leave lawful heir of his or her body then such legal heir or heirs shall become the beneficiary in the place and stead of his or her parent by right of representation.

2. In the event any deceased grandchild leaves no legal heirs, then the beneficial interest to which said grandchild would otherwise be entitled shall revert to the equal benefit of the surviving grandchildren, the legal issue of any deceased grandchild to take by representation.

3. In the event that all of said grandchildren die without legal issue prior to the vesting of all of said trust estate, so much as remains shall be paid or delivered to any heirs of the first party.” (Trans. of Record, p. 95.)

While the indenture provides that after the grantor is dead the income from the trust property is to be paid over currently to the named beneficiaries, it provides, as to the *corpus*, that the trust is to continue “until the youngest grandchild shall have attained the age of thirty (30) years.” And during the life of the trust the *corpus* is to be invested and reinvested by the trustees.

No other conclusion can be reached, therefore, than that the general purpose of the testator as to all the property covered by the indenture, clearly expressed

by that instrument, was that the property or the reinvested proceeds thereof, was to be held by the trustees for thirty years after his youngest grandchild who might be thereafter born came to being.

“A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being.”

In re Walkerly, 108 Cal. 627, 647.

As pointed out in the last cited case at page 648:

“Every express trust, valid in its creation, vests the whole estate in the trustees. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.”

And subsequently in the same case (*In re Walkerly*, *supra*, page 656) the law is appropriately stated:

“In the event of a sale still the proceeds are to be held and invested until distribution. . . .”

“The mere power of sale does not, under such circumstances, save the provisions of the trust, since the proceeds of the sale are still to be held in violation of the law.”

Citing:

Hawley vs. James, 16 Wend. 150;

Haynes vs. Sherman, 117 N. Y. 433.

“The common law rule against perpetuities does not apply only to landed estates. Executory devises, springing and shifting uses, and trusts

whether of realty or personalty were all within its terms."

In re Walkerly, supra, p. 657;

1 *Jarman on Wills*, ch. 9;

Lewis on Perpetuities, p. 159;

Perry on Trusts, secs. 377, 384;

4 *Kent's Commentaries*, 271;

Note: 49 A. S. R. 127.

"The fundamental rule is that a private trust cannot be created so that the vesting of future interests will be postponed beyond the period prescribed by the rule."

21 R. C. L., p. 306, and cases there cited.

"The general rule may be asserted as being that for the purpose of determining whether there is a violation of the rule against perpetuities, the possibility of issue is never considered extinct."

Note: 48 L. R. A. (N. S.) 867 and cases there digested.

The conclusion is inescapable that the "Deed of Trust" of date June 17th, 1932, by its clearly expressed provisions violates the rule against perpetuities and is void. Title to all the property described therein remained, *untransferred*, in the grantor.

II.

Will Devises One-half the Residue to Allan M. Standish

The Superior Court of the State of California in making final distribution of the Estate of Miles Standish, Deceased, situate in that State, interpreted the

residuary clause of the decedent's last will as effecting an outright devise of an undivided half interest in the residue of the estate of Allan M. Standish and distributed only the other half to him as Trustee for the grandchildren. This construction is unquestionably correct and in sound agreement with the law of Trusts.

We realize that the decree of distribution dealt with only property located in the State of California but as an adjudication construing the effect of the Will it does affect all property title to which depends upon that construction.

“A fundamental essential to the existence of any trust is the separation of the legal estate from the beneficial enjoyment; and no trust can exist where the same person possesses both. . . . ”

“Absolute control and power of disposition are inconsistent with the idea of a trust.”

26 R. C. L. 1186;

See Note: 7 L. R. A. (N. S.) 1119.

The Will (Petitioners' Exhibit 2, Trans. of Record, p. 105) provides that Allan M. Standish is to have complete control over and power to sell immediately any of decedent's property constituting the residue of the estate and directs: “and as fast as said property is sold and the proceeds collected, pay over and distribute the same” one-half for the benefit of the grandchildren and the remaining one-half to Allan M. Standish, “in his own right and for his own use and benefit.”

So far as the one-half interest devised to Allan M.

Standish there is: (1) No separation of the legal from the beneficial estate; (2) Absolute control and power of disposition vested in the same person with no possibility of a divesting thereof; (3) the absence of not only a legal purpose and a legal term but of any purpose or of any term whatever.

The paragraph "Fourth" of the Will is susceptible of no other interpretation than that it devised a one-half interest in the residue of the testator's estate to his son absolutely and free of any beneficial interest therein, either contingent or otherwise, in any other person.

III.

California Estate of Miles Standish, Deceased, Had No Rights in Oregon Lands

For the reasons set forth in subdivision I, it is apparent that immediately prior to the death of Miles Standish, title and the right of possession to the timber lands in Coos and Douglas Counties, Oregon, were vested in him. Upon his death one-half of that title passed to Allan M. Standish for the reasons set forth in subdivisiioin II.

In the absence of the appointment of any executor or administrator under the laws of the State of Oregon the right to immediate possession, as a tenant in common owning a one-quarter undivided interest in those lands also immediately vested in Allan M. Standish.

“The Real property of the deceased is the property of those to whom it descends by law or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, and upon the termination of the administration thereof, so much of such real property as remains unsold or unappropriated is discharged from such possession and liability without any order or decree therefor; . . . ”

Oregon Compiled Laws Ann. Vol. 2, Section 19-1202.

The Oregon Courts have construed that statute to mean:

“The fee title to and ownership of the real property of a decedent passes immediately upon his death to his heirs or devisees subject only to the payment of the debts of the deceased and the right of the personal representative to possession for the purposes of administration.”

D’Arcy vs. Snell, 162 Oregon 351, 91 Pac. (2d) 537.

The Findings promulgated in the Court below find from the evidence that the Will of Miles Standish, deceased, was not probated, that no administrator or executor of his estate was appointed and that decedent had no debts in Oregon. (Trans. of Record, pp. 42-43.)

Neither the Estate of Miles Standard, deceased, as a legal entity brought into being by probate pro-

ceedings in the State of California, nor the Executor acting under authority of the California Court had any right in or to real estate lying without the boundaries of California.

Estate of Leonora M. Hills, 176 Cal. 232, 169 Pac.

“With regard to real property, the law of the State in which it is situated as it exists at the date of the death of the owner controls the descent.”

Estate of Leonora M. Hills, see page 234.

There were ample assets of the estate of Miles Standish over which the Executor, appointed by the California Court, had control to pay all debts, taxes and expenses of administration and all thereof were paid therefrom. (Decree of Final Distribution Petitioners' Exhibit 3, Trans. of Record, p. 110.) Under these circumstances the individual title and rights of the testator's son vested under Oregon laws, could not become divested to give the California estate any claim to those lands or the proceeds of any sale thereof.

Estate of Leonora M. Hills, *supra*, at p. 234.

In December, 1935, when Allan M. Standish transferred to the partnership of himself and wife everything of which he was then possessed, he transferred to that partnership both the title to an undivided quarter interest and the then present right of possession to the Oregon lands which had previously vested in him under the laws of that State.

IV.

**Loss Found by the Tax Court of the United States Was
the Loss of These Petitioners**

The Court below has found:

“The loss to the Standish interests was \$17,-201.28, composed of loss on Douglas County tax sale (\$9,201) and loss on the Coos County lands (\$8,000.28).” (Trans. of Record, p. 39.)

This determination is in error to the advantage of these petitioners. The testimony is that \$3,521.94 had been received as the Standish share of the proceeds of sale of timber prior to 1941. The Tax Court of the United States deducted only one-half of that amount from the cost basis of the Coos County Lands. We feel that in good conscience the error should be corrected and that the finding should be considered as reading “the loss to the Standish interests was \$15,440.31.”

The finding, as corrected, is binding on appeal:

“The question ‘said the Court in *Rhodes vs. Commissioner*, 6 Cir. 100 Fed. 2d 966, 969,’ whether property becomes worthless during a particular year is one of fact. The Board made a determination of fact, and the only question of law presented for review is whether the Board’s findings are supported by substantial evidence.”

Commissioner vs. Peterman, 118 Fed. 2d 973, 976.

That loss resulted in the taxable year 1941 and for the reasons assigned in subdivisions I, II and III above the "Standish interests" were vested in 1941:

1/2 thereof in the partnership of Allan M. Standish and Beatrice M. Standish.

1/2 thereof in the Trust created by the will of Miles Standish, deceased.

The half belonging to the partnership and sustained by it in that year amounts to \$7,720.15 and the income of each of these petitioners, as redetermined by the Commissioner because of the disallowance of their respective shares of that loss, should be reduced by \$3,860.07. Their respective deficiencies should each be reduced accordingly.

Respectfully submitted,

R. CLARENCE OGDEN,
Attorney for Petitioners.

No. 11159

In the United States Circuit Court of Appeals
for the Ninth Circuit

A. M. STANDISH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

AND

BEATRICE M. STANDISH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SEWALL KEY,

Acting Assistant Attorney General.

J. LOUIS MONARCH,

JOHN F. COSTELLOE,

Special Assistants to the Attorney General.

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*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 38-49) are reported at 4 T. C. 995.

JURISDICTION

The petitioners for review (R. 51-77) involve income taxes for the taxable years 1940 and 1941. On November 8, 1943, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiencies in the total amounts of \$2,191.42 for the taxpayer A. M. Standish (R. 10-11) and \$2,191.40 for the taxpayer

Beatrice M. Standish (R. 26-27). Within ninety days thereafter and on February 2, 1944, the taxpayers filed petitions in the Tax Court of the United States for redeterminations of those deficiencies under the provisions of Section 272 of the Internal Revenue Code. (R. 5-18, 21-34.) The case is brought to this Court by petitions for review filed on September 17, 1945. (R. 51-77.)

QUESTIONS PRESENTED

1. Whether the Tax Court erred in holding that the property in question was held in trust so that the taxpayers were not entitled to deduct from their individual incomes under Section 23 (e) (1) and (2) of the Internal Revenue Code a loss incurred with respect to the trust property.

2. Whether, if the Tax Court erred in holding that the property was held in trust, the case must be remanded for further proceedings.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals*.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 23.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U. S. C. 1940 ed., Sec. 181.)

STATEMENT

The Tax Court found the facts as follows (R. 38-44):

The taxpayers, A. M. Standish and his wife, reside in Milpitas, California. They filed their income tax returns for the years 1940 and 1941 with the Collector of Internal Revenue for the First District of California. (R. 38.)

The taxpayers are partners in the ownership and operation of the property giving rise to the deductions claimed. The partnership was chiefly engaged in the operation of orchards. (R. 38.)

Miles Standish, the father of A. M. Standish, died on June 22, 1932, a resident of California. At the time of his death he was the owner in fee simple of an undivided one-half interest in certain real property in Coos County and Douglas County, Oregon, having a value of \$19,462.25 for his half interest, as finally determined by the Commssioner in estate tax proceedings. The decedent's interest in the Douglas County lands was valued at \$9,201 and in the Coos County

lands at \$10,261.25. The Coos County holdings and their respective values were 520 acres of agricultural land, \$14,560; 400 acres of timber land, \$440; 1,000 acres of cut-over lands suitable for reforestation, \$1,000; and 9,045 M feet of Douglas fir timber, \$4,522.50, or a total of \$20,522.50, the decedent's one-half being \$10,261.25. The Douglas County property was all timber land. (R. 39.)

In 1941 all the Douglas County land was sold for the nonpayment of taxes and the tracts of the Coos County land suitable for agriculture and the timber land were also sold at tax sales, leaving unsold only the reforestation land. Prior to the tax sale, A. M. Standish and Henry B. Hickey, the owner of the other undivided one-half interest, had sold lands and timber therefrom for \$3,521.95. (R. 39.)

The loss to the Standish interests were \$17,201.28, composed of loss on the Douglas County tax sale (\$9,201) and loss on the Coos County lands (\$8,000.28), computed by subtracting one-half of the value of the reforestation land unsold (\$500) and one-half of the amount realized from the sale of timber and lands (\$1,760.97) from the original value of the decedent's one-half interest (\$10,261.25). (R. 39-40.)

On June 17, 1932, Miles Standish executed a deed of trust whose corpus included the Coos County and Douglas County lands. The trust directed that the corpus should be held by the trustees, who were to pay the net income therefrom to the grantor during his lifetime, and upon his death, to A. M. Standish, his wife and two children in designated proportions. The

trust instrument contained the following pertinent provisions (R. 40-41):

This division of the net proceeds and income from the said property shall continue until the youngest grandchild shall have attained the age of thirty (30) years, when the Trustees shall convey to the Beneficiaries then living, all of the property then remaining in this trust, in such proportion as their respective interests are indicated by the percentages upon which the income has been paid to them, and the trust shall cease.

* * * * *

Eighth: In the event that I have any additional grandchild or grandchildren living at the time of my death, the shares of Patricia and Beatrice Standish shall be proportionately reduced so that such additional grandchild or grandchildren shall share equally with them.

Ninth: In the event that any grandchild shall die prior to the time that the respective beneficial interest due said grandchild shall become payable in whole or part as herein provided, then the invested beneficial interest due said grandchild shall revert as follows:

1. If said deceased grandchild shall leave lawful heir of his or her body then such legal heir or heirs shall become the beneficiary in the place and stead of his or her parent by right of representation.

2. In the event any deceased grandchild leaves no legal heirs, then the beneficial interest to which said grandchild would otherwise be entitled shall revert to the equal benefit of the surviving grandchildren, the legal issue of any

deceased grandchild to take by representation.

3. In the event that all of said grandchildren die without legal issue prior to the vesting of all of said trust estate, so much as remains shall be paid or delivered to any heirs of the first party under the law of succession as the same exists at the date of this instrument.

In 1941 a fiduciary return was filed for the Miles Standish Trust in which a loss of \$14,943.60 was reported from the sale of the Coos County and Douglas County lands. (R. 41.)

Miles Standish left a will dated January 7, 1930, which established a testamentary trust. The will made specific bequests and then contained the following paragraph (R. 41-42):

Fourth: I give, devise and bequeath to my said son, Allan M. Standish, all of the residue of my property and estate of every kind and nature, and wherever situate, of which I may die seized or possessed or in which I may have an interest, in trust, nevertheless, for the following uses and purposes, that is to say: To have, hold, manage and control, bargain, sell, transfer, exchange, invest and reinvest the proceeds thereof; to collect the income therefrom, and out of said income pay over one-half thereof to the Trustees of a certain Trust created by agreement in writing, dated the 7th day of January, 1930, made and executed by Miles Standish, the party of the first part therein named, and Miles Standish and Allan M. Standish, his son, the parties of the second part therein named, their successors and survivors, which said trust agreement is hereby

referred to and made a part hereof, in trust, nevertheless, for the use and benefit of my grandchildren, Patricia Standish, and Beatrice Standish, the children of my said son, Allan M. Standish, and for the use and benefit of any other child or children hereafter born to my said son Allan M. Standish, in equal shares, as provided by the terms of said last named Trust, and to pay over the remaining one-half of said income to my said son Allan M. Standish, in his own right and for his own use and benefit; and as fast as said property is sold and the proceeds thereof collected, pay over and distribute the same in the manner and in the same proportions as said income is to be paid over and distributed; * * * in any event, this Trust shall terminate and division of the property shall be made as aforesaid, not later than fifteen (15) years from the date of my death.

The will was not probated in Oregon. No administrator of the decedent's estate was appointed in that State. The decedent had no debts in Oregon. The will was probated in California on June 29, 1932. The estate was not distributed until July 24, 1942. In the decree ordering the final distribution thereof, the Superior Court of the State of California for Santa Clara County decreed that A. M. Standish was entitled to one-half of the corpus of the specified property of the estate for his own use and benefit, and the other one-half should go to him in trust for the benefit of his two children, Patricia Standish and Beatrice Standish, at that time adult persons. (R. 42-43.)

The Commissioner determined (R. 44) that—

the loss of \$10,512.92 claimed as sustained by the Miles Standish Trust upon the loss of certain timber property because of failure to pay taxes owing to the State of Oregon is disallowed on the ground that any loss sustained is deductible by the Estate of Miles Standish, Deceased, or trusts created by him, either prior to death or in his will.

The Tax Court found that the trust instrument did not violate the rules against perpetuation, and that the taxpayers accordingly were entitled to no deduction with respect to a loss on the trust property.

SUMMARY OF ARGUMENT

The taxpayers dispute the disallowance of a claimed deduction from their individual incomes for a loss with respect to Oregon land, on the ground that although the land had been conveyed in trust, the conveyance was ineffective because it violated the rule against perpetuities.

All their arguments with respect to the validity of the trust rest upon the assumption that the period of perpetuities must be computed from the date of the execution of the trust, rather than from the date of the grantor's death. That assumption is erroneous, since the grantor retained the power at any time to revoke the trust and revest title in himself. Accordingly, under well-settled authority, the period is to be computed from the date of his death. If it is so computed, the trust was unquestionably valid, since all the interests created thereby must have vested by

the time of the death of persons living at the time of the grantor's death.

The taxpayers could not prevail even if it were held that the period of the rule must be computed from the date of the execution of the trust instrument. Their interests vested immediately, and accordingly did not violate the rule. If it be assumed that divesting interests in unborn persons violated the rule, there would still be no ground for holding that the trust was invalid as to the taxpayers. Such holding would have to rest upon an affirmative manifestation of the grantor's intention to that effect. There is no such manifestation; and on the contrary, it appears that to hold that the trust was wholly invalid would violate the grantor's intention.

If the Tax Court should be reversed on the question of the validity of the trust, the case should be remanded to it for further proceedings with regard to questions which it found unnecessary to decide.

ARGUMENT

I

The Tax Court did not err in holding that the property in question was held in trust, so that the taxpayers were not entitled to deduct from their individual incomes under Section 23 (e) (1) and (2) of the Internal Revenue Code a loss incurred with respect to the trust property

In returning their individual incomes for the tax period,¹ the taxpayers each deducted half the amount

¹ While the taxpayers were partners, Section 181 of the Internal Revenue Code, *supra*, provides that they shall be liable for income tax only in their individual capacities.

of losses allegedly sustained on certain Oregon land. The Commissioner determined, and the Tax Court held, that the land was held on trust, so that any loss was deductible only by the trustee from trust income; not by the taxpayers from their individual incomes under Section 23 (e) (1) and (2) of the Internal Revenue Code, *supra*. The taxpayers contend that although the land had been conveyed on trust the conveyance was ineffective, and title to the property remained in the grantor and eventually passed to them free of trust.

As the Tax Court observed (R. 46), the present case apparently is the first instance where the validity of the trust has been called in question; and the trust has apparently been given effect during the whole time since the trust instrument was executed in 1932. The taxpayers were themselves trustees, and the taxpayer A. M. Standish testified in the Tax Court that distributions have been made on the assumption that the trust was valid. (R. 90.) Indeed, he filed a federal income tax return for the trust for the year 1941 in which he deducted from trust income the very loss now sought to be deducted from the taxpayers' individual incomes. (R. 89.) We submit that the present attack upon the trust is as unfounded as it is untimely.

The taxpayers attack the trust solely under the rule against perpetuities. The short answer to all their arguments on this point is that they rest on the erroneous assumption that the period of perpetuities is to be computed from the date of execution of the trust instrument, rather than from the date of the grantor's

death. The error of that assumption is plain when it is considered that the grantor retained absolute power to revoke the trust at any time during his life. (R. 92.) Thus, until the time of the grantor's death, he had power in himself at any time to make himself the sole owner, and the time until his death must be excluded in computing the period of the rule. *Mifflin's Appeal*, 121 Pa. 205, 15 Atl. 525; *Manufacturers Life Ins. Co. v. Von Hamm-Young Co.*, 34 Hawaii 288; *Schenectady Trust Co. v. Emmons*, 261 App. Div. 154, 25 N. Y. S. 2d 230, affirmed, 286 N. Y. 626, 36 N. E. 2d 461; *Equitable Trust Co. v. Pratt*, 117 Misc. 708, 193 N. Y. S. 152, affirmed, 206 App. Div. 689, 199 N. Y. S. 921; *Bankers Trust Co. v. Topping*, 180 Misc. 596, 41 N. Y. S. 2d 736; Restatement, Property, Division IV (1944), § 373; Gray, Rule Against Perpetuities (4th ed.), §§ 203, 524.1; 2 Simes, Future Interests (1936), §§ 515-518; 5 Thompson on Real Property (Perm. Ed.), § 2723; 1 Tiffany, Real Property (2d ed.), §§ 183, 184; Leach, Perpetuities, 51 Harv. L. Rev. 638, 663 (1938); Note, 45 Harv. L. Rev. 896 (1932); cf. *Reinecke v. Northern Trust Co.*, 278 U. S. 339. While the law of Oregon, the state where the land in question lay (R. 39), appears to contain no explicit statement on the matter, there is no reason to doubt that this view obtains there. Cf. *Pearce v. Commissioner*, 315 U. S. 543.

With the period of the rule computed from the date of the grantor's death, the trust was unquestionably valid, since all interests therein must have vested by the time of the death of the taxpayers and grandchil-

dren of the grantor living at his death. (R. 93-96.) Cf. *Buchanan v. Schulderman*, 11 Ore. 150, 1 Pac. 899; *In re McGinnis' Estate*, 91 Ore. 407, 179 Pac. 254; *In re Will of Pittock*, 102 Ore. 159, 199 Pac. 633; *Gratton v. Gratton's Estate*, 133 Ore. 65, 283 Pac. 747.

The taxpayers could not prevail even if it were held that the period of the rule must be computed from the date of the execution of the trust instrument. As the Tax Court held (R. 47), the trust instrument created vested interests in the taxpayers and their two children, Patricia and Beatrice. It provided that 51% of the trust income be paid after the grantor's death to his son, the taxpayer A. M. Standish; 17% to the son's wife, the taxpayer Beatrice M. Standish; and 16% to each of Patricia and Beatrice, their children and the grantor's grandchildren. (R. 93.) Immediately following was a provision that this division of income should continue until the youngest grandchild reached the age of thirty, whereupon the trustees were to convey the trust property to the beneficiaries then living in proportion to the gifts of income. (R. 93.) There was a further provision (R. 95) that if the grantor should have any additional grandchild or grandchildren living at his death, "the shares of Patricia and Beatrice shall be proportionately reduced" so that all grandchildren should share equally. It was also provided that if any grandchild should die before "the respective beneficial interest due said grandchild shall become payable * * * then the invested beneficial interest due said grandchild shall revert" in a specified manner. (R. 95.)

The plain intention of this instrument was to give presently vested interests in the trust property to the two taxpayers and to their two named children, Beatrice and Patricia. As the Tax Court held, this construction is strongly favored by the intermediate gifts of income to them. See also 2 Simes, *supra*, § 356; 1 Tiffany, *supra*, § 168. The grantor elsewhere affirmatively indicated that the interests were vested when he provided that if other grandchildren be born before his death, "the shares of Patricia and Beatrice shall be proportionately reduced"; and that if any grandchild should die, his interest should "revert." (R. 95.) Cf. *Buchanan v. Schulderman*, *supra*.

Since the interests of the taxpayers and of their two named children were vested, there is no basis for contending that they violated the rule against perpetuities.

The taxpayers contend, however, that these interests must be struck down because under the terms of the instrument, grandchildren not in being at the time of execution of the instrument, but born before the grantor's death, might share in the distribution of the trust property.

The interests of those unborn grandchildren could operate only to divest the already vested interests of Patricia and Beatrice. As we have explained, even those divesting interests do not violate the rule against perpetuities, since the period is to be computed from the date of the grantor's death. But if it be assumed that the period is to be computed from the date of execution of the instrument, and that the di-

vesting interests do violate the rule against perpetuities, the case would still be no different. Although a deed contains provisions which are invalid under the rule against perpetuities, other provisions in the deed take effect as if the void provisions had not been employed, unless the grantor has affirmatively manifested an intention that they should not do so. Restatement of Property, *supra*, § 402; 2 Simes, *supra*, § 529; Gray, *supra*, § 247. There is no manifestation of such an intention here; on the contrary, there are affirmative indications that the grantor would not have intended that possible invalidity of the interests given unborn grandchildren would void the interests of the taxpayers and their two children named in the trust instrument. On the face of the instrument it appears that the grantor's primary concern was the welfare of the named beneficiaries; the gifts to those grandchildren who might be born between the time of execution of the trust instrument and the time of his death cannot be regarded as more than a conveyancer's flourish, especially when there is considered the fact that the trust instrument was executed only five days before the grantor's death. (R. 39, 40.)

II

If the Tax Court erred in holding that the property was subject to a valid trust, the case must be remanded for further proceedings

In view of its decision that the taxpayers could not in any event be entitled to the claimed loss because any loss would be deductible only by the trustee

from trust income, it was unnecessary for the Tax Court to pass upon numerous questions which would remain if it were decided that the trust was void. Thus, the Tax Court did not decide the question whether the property in question was subjected to a trust by the will of the grantor;² whether, if the loss was incurred by the taxpayers as individuals, it was incurred in a trade or business or in a transaction entered into for profit within the meaning of Section 23 (e) (1) and (2) of the Internal Revenue Code; whether if there was a deductible loss, it was subject to the limitations imposed upon capital losses by Section 117 (c) (d) of the Internal Revenue Code, as amended by Section 212 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862; whether part or all of the claimed loss should be disallowed on the ground that the taxpayers have not shown that it should not be attributed to the earlier years in which the state taxes which caused the "loss" were incurred; or whether, in view of the prior deduction of the loss in question from the trust income (R. 89), the case calls for remedial action under Section 3801 of the Internal Revenue Code. Finally, the taxpayers concede error in the Tax Court's finding of the amount of the "loss". (Br. 26-27.) These matters would call for further proceedings in the Tax Court before the case would be ready for final decision by this Court

² The taxpayers concede, as indeed they must, that the probate decree of the California court (R. 109-117) had no effect upon title to the Oregon land here in question (Br. 24-25). The will was not probated in Oregon, and no administrator was appointed there. (R. 42-43.)

(cf. *Helvering v. Rankin*, 295 U. S. 123) ; accordingly, we will not undertake to discuss them in this brief.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted,

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